THE FOUNDATIONS OF THE MODERN COMMONWEALTH

ARTHUR N. HOLCOMBE

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By

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HARPER & BROTHERS, PUBLISHERS
NEW YORK AND LONDON

320.101
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THE FOUNDATIONS OF
THE MODERN COMMONWEALTH

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By Harper & Brothers
Printed in the U.S.A.

Third Printing
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PREFACE

"FROM my scattered and uncertain knowledge of history and government," writes a recent graduate of Harvard College in a personal letter to the author, "it seems to me that government is not only a necessary evil—*but it has always existed for the benefit of those in power, and their friends.*" The writer of this letter, an immigrant's son, who had worked hard for his education and yet found time to study history and government as well as subjects of more immediate practical use, was answering some questions which must often arise in the minds of Americans whose experience of life causes them to reflect upon the nature of government. Is government an evil? If so, is it a necessary evil? Has it always existed for the benefit of those who govern, and must it always do so, or may it also benefit the governed?

Americans pride themselves on taking a realistic view of things and are prone to answer such questions as these in the manner in which they are answered above. The practical problem of government, they say, is, therefore, so to distribute the power that the benefits may be as widely shared as possible. But is this the wisest answer? And if it is, then how widely is it practicable to distribute the power without spreading it out so thin that the government loses what little capacity it may possess for the service of public interests? The anarchist, on the one hand, is merely a person who would distribute the power so widely that its benefits would be altogether lost. On the other hand, there are those who believe so strongly that government is a *necessary* evil, that they would concentrate authority in the fewest possible hands lest the

burden of the evil become too great to be borne. If these extremes of opinion are to be avoided, then how many shall share in the power? And what share shall each receive? And where shall the line be drawn, beyond which the authority of the rulers shall not go, in order that within some limit the private individual may do as he pleases?

Having undertaken to show how far the science of government has gone in discovering the answers to these questions, I was struck by the difficulty of writing on the subject without first defining the meaning of terms. The word "govern" itself is derived from the ancient Greek expression meaning to steer. A "governor," therefore, is a helmsman or pilot. Carrying out the figure of speech, the science of government may be defined as the science of piloting the ship of state. But what is a ship of state? And whither is it to be piloted? Or, dropping the metaphor, what is a state? And what ends, if any, does it serve? To these questions many answers have been given, but without resulting in any general agreement among those who write about the state and about government. Some writers mean by the state one thing; others, another. The confusion of language breeds confusion of thought. Without agreement in the use of these fundamental terms it is idle to attempt to answer the further questions: Who shall be the pilot of the ship of state? How shall he be compensated for his pains? And will he ever be worthy of his hire? The discussion of the nature of the state and of the purposes of its existence has filled the following pages and crowded out the consideration of forms and processes of government. I have been content to try to state the problem of government, believing that a fair statement of the problem is at least the beginning of its solution.

So this book is only an introduction to the study of the

science of government. Indeed, it is only a partial introduction, for, like ships of the sea, ships of state are of various kinds, and it will scarcely be denied that in the inferior kinds of states government has often existed mainly for the benefit of those in power and their friends. But more than that is now demanded of the rulers of the better sort of states, and it is of the latter that I write. It is particularly the government of the modern commonwealth to the study of which this book is an introduction. In other words, the problem which I have tried to state is that of government not merely, but especially that of popular government at the present time.

The notes on books, appended to each chapter, make no pretense of completeness. They are confined to books in the English language—especially recent books—which the interested reader may care to examine. I have tried to include chiefly those which may help him to pursue further the particular topics in which he may be most interested. Many books which I myself have found helpful are omitted; others are included which maintain theories which I cannot accept. Some, indeed, most readers will agree, are bad books. They are significant on account of the errors rather than the truth which they contain. Some books also are included which deal mainly with topics which I have scarcely noticed, if at all, because I could not do so without digressing too far from the course of my argument. But the topics with which they deal are the subjects of controversy among political scientists and cannot be ignored by those readers who wish to pursue further the study of contemporary political theory.

In conclusion I wish to express my gratitude to my friends who have contributed by many private and informal discussions to my understanding of my own ideas. They will not expect me to name them here, but I ought to mention three who have read the manuscript or proofs

and given me the benefit of many helpful criticisms and suggestions: Mr. Hector M. Holmes of the Massachusetts Bar, and Prof. Robert H. Lord, and Mr. Eugene P. Chase, my colleagues. It is doubtless unnecessary to add that none of them is responsible for any of the opinions which I have expressed on various controversial matters relating to the nature of the modern commonwealth and of the ends it is designed to serve.

A. N. Holcombe.

Cambridge, Massachusetts.
May 9, 1923.

PREFACE TO SECOND PRINTING

I have taken advantage of the demand for a reprinting of this book to correct sundry typographical and other errors which had crept into the first edition. I have also added to the bibliographical references the titles of some important books which have appeared since this book was originally published. I take this opportunity of expressing my appreciation of the kind reception which has been extended to this book.

A. N. H.

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"How are we to secure the best direction of human affairs and the maximum of willing co-operation with that direction? This is ultimately a complex problem in psychology, but it is absurd to pretend that it is an insoluble one."

—H. G. WELLS:
"The Outline of History"

THE FOUNDATIONS OF THE MODERN COMMONWEALTH

CHAPTER I

THE PROBLEM OF POPULAR GOVERNMENT

1

The rule of the few

"NOTHING appears more surprising to those who consider human affairs with a philosophical eye," wrote a British philosopher of the eighteenth century, "than the easiness with which the many are governed by the few."[1]

However surprising this observation may have been to thinking men like Hume, it seemed at the middle of the eighteenth century to be supported by the facts. In England political authority lay in the hands of the King in Parliament. That body then comprised in addition to the King some seven hundred persons, divided between the Houses of Lords and Commons. The leaders of that body ruled the British Empire. Not one man in a hundred in Great Britain voted for members of Parliament, and elections came only after long intervals. A greater number of Englishmen shared in the conduct of affairs to a limited extent by occasional service on juries, but the mass of the people were passive spectators of their government. Their part was to pay the taxes, serve in the wars, and obey the laws like dutiful subjects. Such was the government of the British Empire when the great French political philosopher, Montesquieu, pronounced that government the most

[1] David Hume, "Of the First Principles of Government," in his *Essays, Literary, Moral, and Political,* No. IV.

free and the best the world had ever seen. In the principal other states of the world the disparity in numbers between the rulers and their subjects was even more striking than in Great Britain. In France an absolute monarch, aided by a handful of male and female courtiers and clerks, ruled with apparent ease over a much greater population than the British. The same phenomenon appeared in the other world powers of that period, Spain, Austria, Prussia, Russia, and Turkey. Everywhere, as Rousseau presently exclaimed, man was in chains.

The submissiveness of the many

Man, moreover, showed little inclination to break his chains. Hume was struck not only by the easiness with which the many are governed by the few, but also by "the implicit submission with which men resign their own sentiments and passions to those of their rulers." In England there had been no serious political disturbance since the expulsion of King James the Second in 1688. In France the Bourbon monarchy had encountered no notable resistance since the time of the Fronde. In Spain and in Austria, Bourbons and Habsburgs, in Prussia and in Russia, Hohenzollerns and Romanoffs, in Turkey the Sublime Porte, could boast, as Louis the Fourteenth of France was alleged to have boasted: "L'état, c'est moi." If the sovereign was not actually the state, his courtiers at least were more than ready to let him think that he was. Men had tamely submitted so long to be taxed without their consent, conscripted, subjugated in war and exploited in peace, that none but those "with a philosophical eye" could expect anything else.

The shifting of power

But the masses of mankind were not content to remain the passive spectators of their governments. In the year of Hume's death the American Declaration of Independence inaugurated a new era. In 1789 the Revolution broke out in France, and the *ancien régime* fell with a crash that shook the foundations of society throughout the civilized

world. A century and more of political instability followed. At the opening of the Great War there was no important state in which political authority was as closely held in the hands of a few rulers as in 1776. Russia and Turkey were the last of the old world powers to curb their inherited autocracies. The former had taken the first step from absolute toward constitutional monarchy when the Czar summoned the Duma after the Revolution of 1905. The Ottoman Empire had introduced some of the forms of representative government after the Young Turkish Revolution of 1908. Outside of Europe the Emperor of Japan granted his subjects a constitution in 1889, and in China the Manchu dynasty fell after the Revolution of 1911. Even the Shah of Persia had begun to recognize the political aspirations of his people. Since the opening of the Great War the Hohenzollerns and Romanoffs have lost all their former authority. The Bourbons and Habsburgs have lost theirs, except in Spain. Though kings still reign in nearly a dozen of the European states, they do not govern. Their power has passed to more capable hands. Their actual position was trenchantly characterized by Theodore Roosevelt, after he had visited nine so-called monarchs in their palaces, as that of a "kind of sublimated American vice-president," a position which he declared would be "appallingly dreary for a man of ambition and force."[1]

Contemporary political restlessness

To-day no one who considers human affairs with a philosophical eye can suppose that "men resign their own sentiments and passions to those of their rulers," whatever be the actual number of the latter, with "implicit submission." During the American Revolution George the Third, who wished to be a real king and who did not have a philosophical eye, learned by hard experience how much

[1] J. B. Bishop, *Theodore Roosevelt and his Time shown in his Letters*, Vol. II, p. 211.

more difficult it is to govern men than he and his minions had expected. In the French Revolution Louis the Sixteenth learned the same lesson by even harder experience. Since then many an ambitious and forceful man has made the same bitter discovery which the great French patriot Danton is said to have voiced on his way to the guillotine: "Better be a poor fisherman than meddle with the government of men." In France alone since 1789 there have been no less than three different monarchies, two empires, and three republics. Altogether an even dozen of constitutions have been promulgated, the average life of which, till the establishment of the Third Republic, was less than eight years. The Third Republic has now endured for half a century, and its constitution has become one of the oldest in existence among the European peoples. Indeed —and this is a striking commentary on the political instability which has persisted elsewhere in Europe—the French constitution is the oldest of those which have suffered no substantial change since their original adoption. Italy, whose present constitution goes back to 1848, though it extended then to but a small part of the Italian people, did not establish manhood suffrage until 1912. Belgium, whose constitution goes back to 1831, did not establish equal manhood suffrage until the close of the Great War. Even in England, where the ship of state has ridden the political storms of the revolutionary era more steadily than on the continent of Europe, the government has been profoundly altered by a series of great enactments beginning with the Reform Act of 1832 and ending for the moment with the Parliament Act of 1911 and the Representation of the People Act of 1918. Among all the active independent states of the world none now carries on its government after the fashion prevailing when Washington first took the oath of office under the American Constitution. The nature of the changes which have been

made and especially the extent to which the masses of the people have been admitted to a share in the government vary widely in the different countries. But everywhere the rulers of men have been forced to share their power more and more with the ruled. Everywhere man has submitted restlessly, if at all, to his chains.

The instability of authority

Nor is the end of the revolutionary era in sight. The majority of the European peoples now live in states whose governments have been violently overthrown since the outbreak of the Great War. The oldest of the new creations, the Russian Soviet Republic, has endured for only five years, and its stability is yet uncertain. In the Empire that has seemed most firmly established, that of Great Britain, hereafter to be known as the British Commonwealth of Nations, the independence of South Africa, of Australia, and of Canada already exists in almost everything but name, and the Irish Free State enjoys the name as well as most of the substance of independence. The British have had to set Egypt free without formal reservations, and India has seethed with discontent. In Great Britain itself, as well as in France and Italy and Japan and other states whose governments might seem to have been most successful in recent years, the authority of the established rulers has been challenged by the leaders of newly organized groups of people within the state. The labor unions, the labor parties, the Socialists, the Communists, to mention only one series of new groupings, by recognizing leadership not provided for in the official organization of the state, have disturbed the balance of social forces, and threaten the established political equilibrium. The rulers of these states must work out a new adjustment in which these groups will find their proper place, or surrender their authority to those who can solve the problem. An illuminating illustration of this process is afforded by the recent history of Italy. Power slipped

from the feeble grasp of rulers who had proved incapable of dealing with the disorders, which the Socialists and Communists had fomented, and was resolutely seized by the Fascisti. The course of politics since Hume's death has abundantly justified his surprise at the apparent submissiveness of the masses and the easiness with which they were governed by the few.

Permanence of the rule of the few

The progress of democracy during the era of revolution has compelled rulers to share their power more and more with the ruled. The extent to which this has been done has varied greatly in different states. One of the most instructive comparisons of states would show to what extent this has been done. Yet this progress has not tended greatly to enlarge the number of those who actively participate in the most important decisions of modern governments. That number remains comparatively small. This was most evident during the Great War. In England Lloyd George's War Cabinet contained at any one time only six or seven men. In France Briand organized a War Cabinet of similarly small dimensions. Although his successors in the conduct of the war, particularly Clemenceau, restored the practice of conducting the government through the instrumentality of the whole Council of Ministers, and even enlarged the Council, it may be suspected that the real seat of power was an inner circle composed of a few select men. In both these countries the representative bodies ratified the policy of the executives without much more than perfunctory discussion, in France perhaps to a less degree than in Great Britain. Even in the United States the most important decisions were made by the President with the advice, not of the regular Cabinet of ten, but of a special War Council comprising the heads of the most important war agencies. The American Congress was careful, as long as active belligerent operations continued, not to embarrass the executive in the conduct of

the war by too critical scrutiny of his measures. In times of peace, the dominance of the comparatively few who are the principal rulers of a state is not so conspicuous as in time of war. But even in normal times the immediate effect of democratic changes is not to increase the number of those who participate directly in the conduct of current affairs, but mainly to shorten the intervals between elections, during which the power of the few who rule is subject to no tangible restraint, and to increase the numbers of those who take part in these occasional elections.

The opinion of Bryce

The phenomenon of government of the many by the few has been noted by many political philosophers. The wisest among those of modern times, Lord Bryce, in his presidential address to the American Political Science Association, attested its permanence in striking language. "The time-hallowed classification of forms of government divides them into Monarchies, Oligarchies, and Democracies. In reality there is only one form of government. That form is the Rule of the Few. The monarch is always obliged to rule by the counsel and through the agency of others, and only a small part of what is done in his name emanates from his mind and will. The multitude has neither the knowledge nor the time nor the unflagging interest that are needed to enable it to rule. Its opinions are formed, its passions are roused, its acts are guided by a few persons—few compared with the total of the voters —and nothing would surprise it more than to learn by how few." [1] No witness is more competent to testify than Bryce, the author of the most adequate of all the many studies of modern democracy, and himself for a time one of the few who ruled the British Empire, the most numerous and most diversified aggregation of humanity the world has ever seen under a single government.

[1] James Bryce, "Relations of Political Science to History and Practice," *American Political Science Review*, Vol. III, p. 18.

2

Why do the many obey the few?

Why should the many obey the few? This, the most important question which the political scientist has to answer, is perhaps the question that arises first in the minds of the masses of men. But it is the last question which the political scientist should undertake to answer. The data of political science are the acts of men. Until it is known how as a matter of fact men act, when they act politically, and why they act as they do, it is futile to consider whether or not they ought to act as they do. Assuming, then, that as a matter of fact the many generally obey the few, the first question to be considered is, Why do they act in this way? This question, though comparatively simple, is difficult enough.

Hume's answer

Why do men obey their rulers? Hume, who was at least a facile philosopher, was ready with an answer. "When we inquire," he continued, "by what means this wonder is effected, we shall find that, as force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and military governments, as well as to the most free and most popular." For example, consider the authority of the Sultan of Turkey, let us say, at the height of his power. It appeared to rest on force. But, in fact, Hume would reply, he was dependent on the loyalty of his janissaries, without whose support he could do nothing. As they greatly outnumbered him, he could not compel them to obey, and the foundation of his authority was, therefore, their consent to his rule. Thus Hume, in order to give his paradox a consistent interpretation, renders it inadequate as an explanation of political obedience. For the facts to be explained include the obedience of subjects other than janissaries, and their submis-

siveness may well be the result of force, or of fear of the organized and therefore preponderant force which the Sultan at the head of his janissaries had at his command. One may say, if one pleases, that the authority of rulers, even the most arbitrary and despotic, rests upon the consent or opinion of the ruled, but such opinion is of many different kinds in accordance with the many different circumstances under which obedience may be required.

Inadequacy of Hume's answer

A political philosopher no less facile than Hume and possessed of a much firmer grasp on the realities of politics was Benjamin Disraeli, the celebrated British statesman. In the year 1852, during the reaction after the revolutions of 1848 and on the eve of the establishment of the Second Empire in France by Louis Napoleon, he wrote: "Let us not be deluded by forms of government. The word may be republic in France, constitutional monarchy in Prussia, absolute monarchy in Austria, but the thing is the same. Wherever there is a vast standing army, the government is the government of the sword. Half a million of armed men must either be, or be not, in a state of discipline. If they be not in a state of discipline, but follow different chiefs, it is not government, but anarchy; if they be in a state of discipline, they must obey one man, and that man is master." [1] One may say if one pleases that such a government is founded on opinion, but that opinion is of different kinds. Some of those who are "in a state of discipline" expect some advantage from submission; others obey because they fear the penalties of disobedience; while persons outside the military establishment may acknowledge the authority of the "master" for various reasons or for no reason whatever which they could explain. In a sense of the word all government is undoubt-

[1] Benjamin Disraeli, *Life of Lord George Bentinck, a Political Biography*, Whibley's edition, pp. 358-359.

edly founded on opinion, but the obedience of the governed may spring from opinion which is dispassionate and rational, from the crudest prejudices, or from the most abject fears.

Alexander Hamilton's answer

The question, why do men obey their rulers, may seem to be an academic inquiry, but it always has to be faced by the working politicians and statesmen. The art of government is the most difficult of all the practical arts. It constrains those who exercise authority in the name of the state to accept responsibility for putting their measures into effect. Doubtless a well-organized state would run for some time under its own momentum, even if impractical men were at the helm. But sooner or later problems arise which compel rulers to consider how they shall contrive to get themselves obeyed by those whom they wish to rule, or whether they will be obeyed at all. The most conspicuous illustration of such a problem is that of the reformation of an old and unsatisfactory government or the creation of a new one. In America this problem in an acute form confronted the Federal Convention which framed the Constitution of 1787. The precise problem before the members of the Federal Convention was this: to frame a government which the American people would obey in all matters of national concern in preference to the better-known and longer-trusted governments of the several States. The first attempt to solve this problem, the Articles of Confederation, framed by the Continental Congress in 1777, was admittedly a failure. The members of the Convention were fully aware of the difficulty of their problem, and faced it boldly, none more boldly perhaps than the brilliant young politician, Alexander Hamilton.

(1) "Interest"

Hamilton devoted one of the most striking passages of his greatest speech in the Convention to an analysis of the foundations of political obedience. The authority of

rulers, he said, according to Madison's report,[1] rests in the first instance on the interest which the ruled have in supporting them. Those who would maintain themselves in power must not only consider, but be able to promote, the interests of all those whose support is essential to the stability of their position. The Federal Government therefore, he argued, should be so constituted and its officers equipped with such authority as would enable them to assure more adequate protection and encouragement to the interests of at least the strongest and preponderant elements among the people of the Union than could reasonably be expected under the existing conditions from the officers of the State governments. Otherwise those elements would look to the State governments rather than to that of the Union for the advancement of their interests, and the stability of the latter would be impaired.

(2) Personal ambition

Secondly, it was necessary to frame a government which would provide careers for men of ambition and force. Government, he believed, was not an easy, but a difficult task. Only energetic and masterful men were capable of working successfully the institutions of a powerful state, even if those institutions were well-devised and firmly established. Such men must be enlisted in the service of the Union, if practical men were to be convinced of its necessity and general utility and to transfer to it a due measure of that ungrudging loyalty which had hitherto been claimed by the State governments. This could best be done by fortifying the principal offices with such powers and sustaining them by such emoluments as would attract strong and capable men. The innate love of power, which animates the natural rulers of men, could then be relied upon to seduce them from the service of the State governments, leaving the latter in the hands of inferior men, who

[1] Max Farrand, *The Records of the Federal Convention,* Vol. I, pp. 284-285.

would lack either the interest or the ability to exalt them above the government of the Union. Wherever the strongest men are found, whether in the army or in the church, in the service of capitalistic business enterprise or of organized labor, thither political authority, whatever the formal constitution of the state, will tend to flow. If the formal constitution is to correspond to the realities of life, it must ensure a supply of men in public office capable of bearing the burden of power to be exercised by the government, or the power will go elsewhere and the formal government become a hollow sham or ignominiously fail. So Hamilton demanded for the proposed new and more perfect Union what people then used to call a "high-toned" government, an impressive, expensive, and powerful structure.

(3) Habit

Such a government, he believed, would eventually acquire the additional strength which springs from a long-continued sense of obligation on the part of the people. Such a sense of obligation should culminate in an habitual attachment to the officers of the Union, whoever they might be, one of the most important, in his eyes, of the sources of the authority of rulers. Nor did he overlook the part to be played by fear and force, the fear of the law and, in the last extremity, the force of arms, in maintaining their authority. Finally, he spoke of "influence," by which he meant the power of appointment to offices of honor and of profit, the power of the rulers to attach particular individuals to their personal fortunes through the shrewd dispensation of the public patronage. He urged that the patronage be concentrated in a comparatively few hands, and those the hands of the men designed to be otherwise the most influential in the government of the Union, in order that the whole authority of the government might be easily mobilized and wielded most effectively. In the constitutional arrangement of the powers

(4) Fear and force

(5) "Influence"

of the President and Senate it is easy to discern the triumph of Hamiltonian principles.

Sentiment as a ground of political obedience

Hamilton was a "realist" in politics. He had little faith in the disinterestedness of people or in the enduring force of popular sympathies or idealistic aspirations. His "realism" was at once his strength and his weakness. When he came to power as the first Secretary of the Treasury under Washington, he contributed mightily to the actual establishment of the new and more perfect Union. But for all his insight into the springs of human action he could not retain the power which Washington rather than the people entrusted to him. The politician cannot live by "realism" alone. He must also be something of an "idealist," if he is to retain power in a state where he is dependent in the long run upon the opinion of the broad masses of the people. If he is unwilling to put his trust to a great extent in the sympathies of the people, he must build the foundations of his authority with less dependence upon popular approval. Hamilton was not altogether unaware of this, as his plan for a federal government, happily rejected by the Convention, plainly shows. It was better understood by his great rival, Jefferson. The latter, though not ignorant of the artifices of practical politics, appreciated at more nearly their true value the force of sentiment and disinterestedness in the United States, and was thereby sustained in his authority through great vicissitudes of fortune and under the most trying circumstances.

The grounds of obedience in general

Those who have observed most closely the actions of men, the psychologists, are far from agreement concerning the springs of human conduct. But they agree on one conclusion: political obedience is one form of a general phenomenon, characteristic of mankind. The normal man obeys many authorities. He begins as a child by learning obedience in the home. Every head of a family knows that obedience is not a natural trait of children.

But the habit is in most cases more or less rapidly and effectually acquired. Its acquisition is aided by the experience of the child in the society of other children outside the family, in the school, in the church, and, as he grows older, in the workshop or on the farm. When he reaches man's estate, he finds the world so organized that he cannot live unto himself alone. If he conducts himself well, he may escape direct contact with the policeman. In some cases he may even escape the tax collector. But he cannot escape the downright authority of an employer, or the compelling influence of patrons, or clients, or customers, or the gregarious coercion of fellow workmen, or the more subtle tyranny of neighborhood opinion. We obey fathers and mothers, teachers and masters, capitalists and labor leaders, custom and fashion; why not also obey politicians and statesmen?

There are many means of explaining this general phenomenon of obedience. Men act from various motives, and it may not be possible to ascertain in a particular case precisely what causes determine conduct. There are doubtless few cases in which any single motive operates alone. But the various causes of obedience which together explain the phenomenon may for convenience be summarily described under a few general heads.[1]

(1) Inertia

First, there is inertia. Men obey because it is too much trouble to do otherwise. Disobedience entails effort and struggle. Action, even thought, is laborious. Many men are glad to let others do their thinking for them, and to act for them also, when such inaction on their own part is not itself too irksome, and the activity of the others is not too troublesome in some other way. Aristotle, the wisest man of antiquity, was no less close an observer of men than of other animals and plant life and things in

[1] Cf. James Bryce, "Obedience," Essay No. 9, in his *Studies in History and Jurisprudence.*

general. When he noted that some men are by nature slaves, and others masters, he called attention to a form of inequality which nobody can deny.[1] "For he who can be, and therefore is, another's, and he who participates in reason enough to apprehend, but not to have, reason, is a slave by nature. Whereas the lower animals cannot even apprehend reason; they obey their instincts." Aristotle was right in recognizing the fact of inequality. He was wrong in ascribing that fact to a distinction between apprehending but not having reason. The important difference is not that in intelligence. The modern psychologists with their measurements of intelligence have demonstrated that only a small minority are definitely subnormal in mentality. A small minority also are markedly superior to the mass of mankind. But no correlation has been established between supernormality in intelligence and leadership in the organized activities of men. The actual differences in knowledge and skill, which are great, probably reflect differences in educational opportunities rather than in native endowments. The important difference between men in respect to their natural capacity is that in energy. The fact that distinguishes the masses of men from their natural leaders is their comparative inertia. Leadership is not the consequence of superior intelligence, but of superior enterprise.

The relatively inert are marked out by nature to follow their leaders. This is true in every phase of human association, whether in the home or in the workshop, in "business" or in "society," in the neighborhood or in the state. Slavery as a legal institution happily has ceased to exist. But the dependent status of a modern wage earner relative to that of the capitalist or captain of industry illustrates, often to be sure the consequences of unfavorable fortune or unjust influence, but also those of

[1] *Politics,* Book I, chapter 5.

natural inequalities. Aristotle's justification of slavery in ancient Greece could not justify that institution in the modern world; but either a similar process of reasoning justifies the modern system of capitalism, or that system in its present form must stand condemned. It is not without significance that wage earners generally seek to escape the servitude of the traditional relationship between master and servant by substituting for the authority of their old masters the mastery of men who can lead them in their unions. The change marks an improvement of status, but the new relationship is no more natural or unnatural than the old. The habit of obedience in the family springs from the original inertia of the child. The foundation of parental authority continues to lie in superiority in energy until the growth of the child makes possible the development of other causes of obedience. Inertia may never be the original cause of obedience in other forms of human association, but it must always be one of the principal factors in any adequate explanation of the organized activities of men.

(2) Deference

Secondly, there is a tendency in many men toward obedience which may be said to spring from deference or a sense of subordination. Such men not only are inferior in some respect by nature or in consequence of inequality of opportunity, but also are conscious of it. This consciousness makes them indisposed to challenge the authority of those whom they regard as their "betters." They gladly defer to the opinions of their superiors, whether the superiority consists in strength, intelligence, moral character, or social capacity, or merely in established reputation and position. The greater part of the men who follow their leaders not only submit to leadership but are proud of it. They ask only that leadership be masterful. Insubordination would be regarded by their leaders not merely with surprise as unnatural, but even with pain as ungrateful. This senti-

mental relationship between leaders and followers, whether in the family, the neighborhood, the trade or industry, the political party, the church, or wherever organized action takes place, is thoroughly natural. It is also wholesome, if the leader uses his influence for the good of all, and not merely for selfish ends. But where he exploits his position for private purposes, the relationship is perverted, and cannot permanently endure. Like the first of the causes of obedience, the sense of subordination begins in the home, when rightly constituted, but it pervades all human associations. Like the first, it affects not only the relations between individuals within a group, but also the relations between groups, even such groups as nations and races.

(3) Sympathy

A third cause of obedience is sympathy. The psychologists and biologists do not agree concerning the foundation of the fellow feeling which exists among people bound together by a common consciousness of kind. The historian, however, who observes the actions of men at longer range than the psychologist and biologist but none the less dispassionately, is familiar enough with its manifestations. Whether it originates in the instinctive gregariousness of mankind, or is acquired through the effects of association and imitation, it operates powerfully to strengthen the hold which natural leaders exert upon their followers. Clannishness, class consciousness, party spirit, patriotism, all are emotional expressions of a disposition to act in a certain way in company with our kindred, or neighbors, or fellows in some kind of association about which we feel intensely. Sympathy reaches its most exalted form in the true Christian's love of mankind. Thou shalt love thy neighbor, it is written, as thyself. Men cannot love, however, at command. They can love only when the spirit moves them. The modern development of means for the cheap and easy transmission of "news" has greatly extended the scope of people's sympathies and broadened

the scale upon which leadership can utilize this cogent spring of action. We have friendly societies, welfare organizations of many kinds, civic associations, national leagues, race congresses, resting on a fellow feeling or consciousness of kind that makes all their members more disposed to act together and their leaders correspondingly more effective. We live in an age of collective action, and what could never be accomplished if leadership were dependent upon inertia and deference becomes easy when it can work upon sympathy. Sympathy operates more actively than the former springs of obedience. It not only provides ready support for leadership, it creates a demand for leadership. It is quicker than reason, it is more wholesome than fear. Whatever may be the case with leaders, for followers it is the most reliable guide to action that is available. The impulses to which sympathy gives rise may not always, judged by their effects, be good. Lynch law is as much a product of such impulses as child labor legislation. But whatever may be thought of the character of its effects in particular cases, there can be no doubt that sympathy on the part of those who are led always makes leadership more effective.

(4) Fear

A fourth cause of obedience is fear. Intimidation and violence will, without doubt, accomplish results which are unattainable by purely pacific leadership, no matter how energetic. Children who can never learn to love their parents can learn to fear them; parents who are not lovable can establish at least an imperfect rule by force. Unruly scholars learn that behind the gentle schoolmistress stands the stern truant officer. What is true in the home and in the school is true elsewhere. Fear is the promptest and most direct means of restraining the violent and the vicious in any community. Force is naturally, therefore, one of the earliest expedients when established authority is threatened by insubordination. Historically, it was probably

the first means of establishing authority outside the family.

Fear is always a tempting instrument for procuring obedience. Since established authority is generally supposed to have superior force on its side, intimidation is an easy instrument to employ. It requires no great amount of patience on the part of the ruler, and patience is a rarer quality in rulers than the faculty of commanding force. The means of stimulating fear, moreover, are often subtle: threats of violence not merely, but also, to mention only one field for the exercise of authority, threats of lockouts or blacklists on the one hand, of strikes or boycotts on the other. Yet fear cannot compel obedience. Despite the intimidation of the law and the violence of public officers, incorrigible offenders continue to fill the prisons. Fear cannot even be relied upon to bring about an outward compliance with the wishes of the authorities. Force may prevent active disobedience, but passive resistance remains open to him who will not obey. Intimidation has filled the pages of history with the sufferings of martyrs from the earliest nonconformists to the latest hunger-strikers, but it has failed to produce compliance. Fear is not as wholesome as sympathy, nor as plastic as deference, nor as persistent as inertia. It may be a powerful, but it is also a limited, means of procuring obedience.

(5) Reason

The last cause of obedience is reason. A child may obey because he fears the penalties of disobedience. He does better when he obeys because he understands the reasonableness of obeying. This he cannot do when obedience first becomes necessary for his preservation. As he approaches the years of discretion, it becomes both more possible and more important. If a man were merely rational, and devoid of feeling and sentiment, he would obey whenever obedience was to his interest, and not otherwise. Neither fear nor affection nor habit would influence

his conduct. There probably are no such men. Enlightened self-interest is merely one of the springs of human conduct. Man is, of course, a more or less selfish as well as a rational animal, and calculations of interest must therefore influence his conduct; but he is also a sociable animal and his conduct cannot be determined by selfish reasons alone.

Enlightened self-interest

Nevertheless, the deliberate pursuit of individual interests goes far to explain much of the action of men.[1] It is not surprising that some philosophers should neglect all other factors in their explanation of the phenomenon of obedience. Certainly obedience is in many cases directly and immediately to the interest of those whose duty or privilege is to obey. In other cases, however, the advantages of obedience are more indirect and remote and even so uncertain as to be questionable. In still others obedience is plainly injurious. Self-interest, moreover, will lead men of different degrees of intelligence to different courses of action, even when the circumstances are identical. Again, men have to reason in the light of what they know, and their information is generally more or less imperfect. If men were perfectly informed and thoroughly intelligent, the rationalist's ideal of enlightened self-interest might be attained. Men would disobey when, according to the best calculation they could make, the probable mischiefs of resistance, as Bentham put it, appeared less than the probable mischiefs of submission. Otherwise they would obey. This would be true of all those relationships, where some are supposed to be in the habit of paying obedience to others.

Disinterestedness

Any intelligent man, however, who is pursuing his self-interest as rationally as he can, will not overlook the fact that he cannot profitably consider his personal interests

[1] For an instructive analysis of the effect of interest on opinion, see A. L. Lowell, *Public Opinion in War and Peace*, pp. 53-55.

alone. If, for example, he is calculating the chances of promoting his happiness by disobeying any one of the established leaders exercising authority over him, he must consider how many others will join him in such an act of disobedience. Unless enough others will also disobey to afford a reasonable prospect that he can disobey with impunity, it will generally be more profitable for him to comply, distasteful as compliance may be. A rational man, therefore, will consider the interests of others as well as his own, and self-interest, so far as questions of obedience are concerned, tends to become confused to some extent with the general welfare. It thus becomes possible for men to act rationally and yet, in a qualified sense of the term, unselfishly. Indeed, many men, whom we call public-spirited or altruistic, may act, quite unconsciously of self, deliberately and rationally, to the best of their knowledge and belief, with single-minded devotion to the general welfare. Nevertheless, their conduct will generally be calculated to promote some particular interest or combination of interests which at the moment they identify with the general welfare.

The conflict of interests

Some political philosophers have held the opinion that, if one knows what a man does, one can infer what that man thinks his interests are. Such an inference is based upon the assumption that man is a thoroughly rational animal and not only can know what will best promote his interests, but also will act upon his knowledge. But men have many interests, and it is not at all certain that every man under similar circumstances would put the same interest first, even if all were equally intelligent and equally well-informed. Each man is, in a sense, not a single entity but a bundle of selves. One narrow self is primarily interested in food, clothing, and shelter for the body in which the self is incarnated. A broader self is interested in the food, clothing and shelter of the family, of which the individual

is a member. A yet broader self shares the interests of wider communities, even such abstractions as the justice to establish which states exist and the righteousness which all mankind craves. Nor are one's narrowest interests clear and distinct. As a wage earner a man may share the interests of labor, and as a home owner, those of property. "And so," Lippmann observes in the course of a very penetrating study of public opinion, "while it is so true as to be mere tautology that 'self-interest' determines opinion, the statement is not illuminating until we know which self out of many selects and directs the interests so conceived."[1] Practical statesmen, like Hamilton and his Federalist associates in the Convention of 1787, may make their plans on the theory that men can be governed, if their special interests are kept in equilibrium by a balance of power. Other statesmen, no less practical perhaps, may assume that men will co-operate in the service of the state, because they have a sense of common interests which will be best promoted by such co-operation. Neither theory affords a wholly adequate explanation of the fact of political obedience.

The uncertainty of rational opinion

We must conclude that the normal man obeys the rulers of his state, as he obeys others who exercise authority over him, partly because it is natural for him to do so, partly because he fears to disobey, and partly because obedience seems to him reasonable. The most reasonable men, however, are among those who most distrust their reasoned convictions. Franklin was the greatest American rationalist of the eighteenth century. He was one of the wisest men who took part in the framing of the Constitution of the United States. It was he who finally moved the adoption of that venerable instrument, itself despite its imperfections a great monument to human reason. In doing so, he said: "I confess that there are several parts of this

[1] Walter Lippmann, *Public Opinion,* Chapter XII, "Self-Interest Reconsidered."

Constitution which I do not at present approve, but I am not sure I shall never approve them. For, having lived long [he was then in his eighty-second year], I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects which I once thought right, but found to be otherwise. It is therefore that, the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. . . . Thus I consent, Sir," addressing Washington, who was presiding, "to this Constitution because I expect no better, and because I am not sure that it is not the best." Ungenerous critics among Franklin's associates in the Convention ascribed his cautious endorsement less to the humility of the sage than to the prudence of the politician, who wished to preserve his reputation in the eyes of posterity in the event that the Constitution should fare either well or ill. Be Franklin's lack of confidence in his own opinion genuine or feigned—his long training in the art of diplomacy makes doubts on that point permissible—the normal man has little reason for greater confidence in his opinions.

Defective information

This becomes very evident when one considers how opinions are often formed. First, there is the fabrication of opinion by controlling the sources of information upon which opinion must be founded. The peoples of the world have had many illustrations of this method during the Great War. In the United States, to take the illustration that lies nearest home, the government set up a Committee on Public Information. The duty of this Committee was to furnish the public with such information as would enable them most effectively to assist in the prosecution of the war. All information which might, if generally known, give aid and comfort to the enemy was sedulously withheld. There was no censorship of the press, in the technical sense of an official examination of printed matter prior to

publication, with a view to the suppression of statements believed by the authorities to be injurious to the public interests. But there was an understanding between the government and the press to the effect that certain kinds of news should not be published. Much of it could not be published, because not divulged by the military and diplomatic authorities who alone had the power to reveal it. Other information was "played up" by the skillful press agents of the government with a view to the production of certain emotional reactions among the public just as the dramatist produces the sought-for effects in his audience or the motion-picture director among his spectators. Such manipulation of the press was re-enforced by the employment of public speakers, notably the Four Minute Men, to secure a unanimity and intensity of opinion in support of the government perhaps unparalleled in the history of warfare. It was effective, but it was also artificial. Thus for a time the authority of our rulers was sustained by the help of artifices ordinarily reserved for the support of a market for soap or chewing gum. These artifices were never more energetically and systematically employed than during the war, but they are always used to some extent, not only by statesmen but by all kinds of persons who wish to influence the opinion of mankind. The advantages of such methods to the leaders of men are obvious. The dangers will be considered in another place.[1]

Imperfect reasoning

Secondly, opinion may be fabricated by a variety of methods, when there is no actual concealment or over-emphasis of any of the facts upon which opinion must be founded. One of the most insidious of these methods is what Wallas has termed the exploitation of subconscious non-rational inference.[2] When a baseball pitcher throws

[1] Cf. Walter Lippmann, *Liberty and the News.*

[2] Graham Wallas, *Human Nature in Politics.* See especially chapter III, "Non-Rational Inference in Politics."

a curved ball at the batter's head, he does not intend to hit the batter but to put the ball over the plate. He also intends to stimulate the instinct of self-preservation, so that the batter will involuntarily dodge the ball or at least hesitate until it is too late to strike at it successfully. The experienced batter knows the pitcher's purpose and by an effort of will can resist the impulse to dodge. That impulse is dangerous to him as a batter, because it can act although he is not conscious of it, and because it causes action which, though not irrational, is at the same time incorrect. An unscrupulous pitcher can, of course, throw a straight ball at the batter's head. Such a ball will hit him unless he does dodge, and such pitching is designed to intimidate the batter, not to exploit his propensity for subconscious non-rational inference. On the other hand, a pitcher may throw a curved ball at the plate in such a manner as to move away from the batter and outside the plate beyond his reach. This is not exploiting a subconscious non-rational inference, because there is no instinctive impulse to strike at a ball thrown over the plate, as there is to dodge a ball thrown at one's head. It is simply a kind of deception. Trickery and fraud, of course, like intimidation and violence, may be employed by anybody where the rules of the game permit, or anywhere by unscrupulous men, to create opinions upon which, though erroneous, other men will act in the manner that is desired. Opinions are actually fabricated by all these methods, not only in sport, but also in politics. The old saying that all is fair in love and war overstates the freedom of choice of methods that is generally recognized in those fields of action. The saying has not been supposed to apply in modern politics. Limits are recognized upon the artifices that men may use to accomplish their purposes. But in politics, as in other organized activities of men, much continues to be done which many men deem unfair. Men's standards, and

ability to maintain their standards, vary widely. Hence the disrepute among the more honorable sort of men into which politics in modern democracies has sometimes fallen.

Man a political animal

It is easy to forget that man is by nature a political animal. Since Aristotle first laid this proposition down as the foundation of his philosophy of politics, it seems often to have been forgotten. Hobbes indeed expressly denied its truth, asserting that man is a political animal, not by nature, but by rational conviction. In this he was followed generally by the political theorists of the social compact school and by the later Utilitarians. But the researches of modern scientists tend to confirm Aristotle's opinion. Cannon, the physiologist, has summarized his investigations in the statement, "More and more it is appearing that in men of all races, and in most of the higher animals, the springs of action are to be found in the influences of certain emotions which express themselves in characteristic instinctive acts." And Thorndike, the psychologist, affirms that "the behavior of man in the family, in business, in the state, in religion, and in every other affair of life, is rooted in his unlearned original equipment of instincts and capacities. All schemes of improving life must take into account man's original nature, most of all when their aim is to counteract it." Carleton H. Parker, quoting these statements, in his brilliant, though misnamed, paper, "Motives in Economic Life," adds, "Instincts to their modern possessor seem unreasoning and unrational, and often embarrassing. To the race, however, they are an efficient and tried guide to conduct, for they are the result of endless experiments—under the ruthless valuing mechanism of the competition for survival. In fact, outside of some relatively unimportant bodily attributes, the instincts are all that our species in its long evolution has considered worth

saving."[1] It is evident that conscious rational decisions to obey the established rulers of a state in order to promote the individual's best interests can account for but a part, and probably a small part, of the total quantity of political obedience in the modern world. Impulsive and instinctive obedience must be a more important factor than those who consider human affairs with a philosophical eye formerly supposed. The researches of contemporary psychologists have carried us a long way from the simple rationalistic explanation of human conduct which satisfied the Utilitarian philosophers of a century ago. When asked what qualities are most required in a Prime Minister, the younger Pitt is reported to have replied: "Eloquence first, then knowledge, thirdly, toil, and lastly, patience."[2] The function of eloquence was not so much to appeal to reason as to the emotions, and thus to command the impulsive and instinctive reactions of man. "The empirical art of politics," writes Wallas, after dispassionate reflection upon the processes of actual government, "consists largely in the creation of opinion by the deliberate exploitation of subconscious non-rational inference." The government of men, in other words, is but a branch, though the most complex, of the art of management of gregarious animals in general.

The opinions of political philosophers

The closest students of politics have never failed to appreciate the complexity of human nature and the importance to the practical politician of making due allowances for its vagaries as well as for its normal manifestations. The two political philosophers whose insight is keenest are Machiavelli and Aristotle. The former has been a much abused man, and deservedly so, for he condones, if he does not positively inculcate, political methods which

[1] *Supplement to Publications of American Economic Association,* 1918, Vol. 1, p. 217.

[2] See Lord Rosebery, *Life of Pitt,* p. 264.

no true Christian can fail to condemn, and which even avowedly "practical" men must also condemn, if these methods be judged by the standards of our own time. In his earlier and happier days he was a republican, and his best work is not the famous treatise entitled, *The Prince,* but his masterly commentaries on the history of Republican Rome. But the doctrines set forth in *The Prince* are by no means so unmoral as is often supposed. This is plainly apparent if a comparison is made between this work and the corresponding portions of the writings on politics of Aristotle, whom nobody charges with similar lack of morality. Take Machiavelli at what some critics consider his worst, the well-known chapter "Concerning those who have obtained a Principality by Wickedness." He treats dispassionately the problems of the tyrant who wishes to retain his power. This is certainly an uncongenial task for any right-minded man. Yet it is the business of the political scientist to be dispassionate. Aristotle, in his treatment of the same problems, is no less dispassionate than Machiavelli.

Machiavelli

In the case of the ruler who has obtained his power by wickedness, Machiavelli recommends the earliest possible abandonment of wickedness, though not of reliance on force. Indeed, he blamed a ruler who had acquired his power with no suspicion of wickedness, namely his contemporary, Savonarola, for his neglect to get superior force on his side, and ascribed his fall, despite his high ideals, mainly to that cause.

Aristotle

What position did Aristotle take when he had to consider this problem? "As to tyrannies," he wrote, "they are preserved in two most opposite ways. One of them is the old traditional method in which most tyrants administer their government . . . the tyrant should lop off those who are too high; he must put to death men of spirit; he must not allow common meals, clubs, education,

and the like . . . there is no wickedness too great for him. All that we have said may be summed up under three heads . . . (1) he sows distrust among his subjects; (2) he takes away their power; (3) he humbles them. This, then, is one of the two methods by which tyrannies are preserved; and there is another which proceeds upon a different principle of action . . . The salvation of a tyranny is to make it more like the rule of a king [that is, of one of Plato's philosopher-kings, men whose rule is absolutely disinterested, cherishing the interests of all their subjects regardless of self]. But of one thing the tyrant must be careful; he must keep power enough to rule over his subjects, whether they like him or not, for if he once gives this up he gives up his tyranny. But though power must be retained as the foundation, in all else the tyrant should act or appear to act in the character of a king. . . . He should appear not harsh, but dignified, and when men meet him they should look upon him with reverence, and not with fear. Yet it is hard for him to be respected if he inspires no respect, and therefore whatever virtues he may neglect, at least he should maintain the character of a statesman, and produce the impression that he is one." [1]

All government a kind of tyranny

It is evident that Aristotle's second method proceeds upon substantially the same general principles of action as are inculcated by Machiavelli. In discussing the details of despotic tactics, Machiavelli noted without condemnation examples which neither Aristotle nor any man of good morals could approve. It is a defect either in his character or in his method of exposition which prevents his occupying the high place in the esteem of good men which must be conceded to Aristotle. But the fact remains that, in default of a supply of philosopher-kings, the conduct of affairs, not only affairs of state but those of all kinds of

[1] Aristotle's *Politics,* Book v, chapter 11.

human organizations, must be entrusted to ordinary men, and the most that can reasonably be expected from the normal, fallible mortal is that he follow in the conduct of his home, or his business, or his government, in good faith and to the best of his ability, the second method laid down by Aristotle for the preservation of tyrannies. For the rule of the few over the many, no matter what its nature or what its form, has always been and must always be a kind of tyranny.

3

The importance of public opinion

A fundamental problem of government is to impose such limits on the authority of rulers as to keep them as near as possible to the ideal rule of conduct which Aristotle laid down. In the past tyranny has often been tempered by assassination. Some of the world's favorite heroes have been assassins. Their conduct has been justified by the most rational and moral writers. In modern times, however, certainly in the United States, neither assassination, nor any form of physical coercion, has been the expedient of normal men. Three presidents have been assassinated and one, at the time out of office, but a candidate for re-election, narrowly escaped an attempt on his life. No one of the assassins or would-be assassins was a normal man. Wilkes Booth was a neurotic and liable to obsession by delusions. Guiteau and Czolgosz were certainly of unsound mind, though not so manifestly irrational as to escape the penalty of murder. John Schrank, the wretch who shot Roosevelt, was found to be an incurable paranoiac and sentenced to an asylum for the criminal insane. The best instrument for the restraint of rulers is rational opinion. Rulers may be influenced by the opinions, rational or non-rational, of a greater or less portion of the body of people from whom they expect obedience. If the portion whose opinions are effective is comparatively small, the

government may be termed aristocratic, or plutocratic, or oligarchic; if it is comparatively large, we may call the government democratic or popular. Such a government is said to be founded on public opinion.

Lowell's definition of public opinion

There has been much discussion of these terms. There is, however, nothing recondite about them. Lowell has given an adequate explanation. "Public opinion, to be worthy of the name, to be the proper motive force in a democracy, must be really public. . . . A majority is not enough, and unanimity is not required, but the opinion must be such that, while the minority may not share it, they feel bound, by conviction and not by fear, to accept it; and if democracy is complete, the submission of the minority must be given ungrudgingly." [1] Theoretically, a benevolent despotism might be supported by public opinion. The despotic rule of the guardians of Plato's ideal republic was to have been founded upon the opinion of the subject class, although Plato would have condoned the employment of any convenient artifices to have brought about the semblance of a freewill offering of support. It is said that the rule of the Jesuits in Paraguay illustrated for a time an approach to Plato's ideal. The rule of the British in India, where a handful of strangers administer the affairs of over three hundred millions of natives, is another instance of more or less benevolently despotic rule founded to a considerable degree on a comparatively inert but none the less real public opinion. But the Indian Civil Service, though it has scored notable successes, would not claim to be a body of philosopher-kings; and the people of India, though until recently they seem on the whole to have acquiesced, are so mute that their real sentiments toward their rulers can hardly be known. In a true democracy, as Lowell has said, the submission of the people to their rulers must be ungrudging, and no despotic ruler, no

[1] A. L. Lowell, *Public Opinion and Popular Government,* pp. 14-15.

matter how benevolent his rule may be, can ever know that his subjects obey him ungrudgingly. Such obedience must be active, not passive, and cannot be found with certainty except where, to borrow from Lincoln's fine phrase, the government is of and by, as well as for, the people.

In order, moreover, that there may be a "real public opinion on any subject, not involving a simple question of harmony or contradiction," Lowell adds, "the bulk of the people must be in a position to determine of their own knowledge, or by weighing the evidence, a substantial part of the facts required for a rational decision." [1] This condition greatly limits the range of subjects on which a real public opinion is possible, as long as the supply of news and other necessary information remains as inadequate and as unreliable as at present. Walter Lippmann, who has devoted to this subject more deliberate thought than any other recent writer, has pointed out that the world we have to deal with politically is out of sight, out of reach, and to a great extent out of mind. It has to be explored, reported, and imagined, until gradually each individual makes for himself a picture inside his head of the world outside. This picture may or may not be trustworthy, but it is all the individual has to rely on in forming independent opinions concerning public affairs. So important does this aspect of the matter seem to Lippmann that he has made it the basis of his definition of public opinion. "The pictures inside the heads of these human beings," he writes, "the pictures of themselves, of others, of their needs, purposes, and relationships, are their public opinions. Those pictures which are acted upon by groups of people, or by individuals acting in the name of groups, are Public Opinion with capital letters." [1] Lippmann's analysis of the nature and sources of opinion is extraordi-

Lippmann's definition of public opinion

[1] A. L. Lowell, *op. cit.*, p. 24.
[2] Walter Lippmann, *Public Opinion*, p. 29.

narily perspicacious and instructive, but his distinction between public and other kinds of opinion is inferior to Lowell's. It is not the nature of the action to which opinions may lead that makes them public; it is the extent to which they are shared by the members of a community or state. The fact that an opinion may be acted upon even by the rulers of the state does not determine its character as public opinion. It is rather the character of the opinions which are acted upon that determines whether the government is popular or not.

How shall public opinion be recognized?

The obstacles in the way of the development of an enlightened public opinion constitute the greatest difficulty which popular government has to overcome. Lippmann, recognizing the impossibility that the people of a modern state should acquire under existing conditions a competent opinion about all public affairs, argues that representative government cannot be worked successfully, unless there is an independent, expert organization for making the unseen facts of the Great Society intelligible to those who have to decide public questions. Certainly the improvement of the supply of "news" and "statistics" would greatly improve the conduct of public affairs in democratic states. But it is not enough to establish the conditions under which intelligent public opinion may be formed. It is also necessary to ensure that real public opinion shall be recognized, when formed, and that, in default of real public opinion, the better considered opinions of the people shall be distinguished from the "gusts of passion" and the less deliberate opinions against which masses of men, like individuals, are not immune.

The opinion of the average man

A recent writer has suggested a test for recognizing public opinion, when it exists, or for distinguishing the opinion which is most nearly public from those which are less. "Among a free people the rôle of the ruler is merely to interpret and so far as possible to secure the effective

realization of the drift of sentiment registered in the experience of the average man. A despotic government assures for itself stability by controlling the sentiments of the average man in the interest of a select group. A democracy secures political and national permanence by vesting the ultimate responsibility for national action in the average man." [1]

The unreality of the average man

So public opinion is to be found in the opinion of the average man. If by "average" is meant what is technically meant by the word, this is an extraordinary doctrine. When we try to discover this average man, we find that there is no such animal. We can ascertain the average size of men, or their average length of life, their average amount of education, or income, or wealth, but we cannot find the average man himself. In the United States he would be about six-sevenths native born, and one-seventh alien. He would be about nine-tenths white, and less than one-tenth black, with traces of yellow and red. Such a specimen, if he were available, would be of no interest to the political scientist. Certainly the word, as used by the writer referred to, is not intended to be understood in this sense. It is doubtless employed in the sense which Bryce gives it in his lecture on *The Hindrances to Good Citizenship*. "Let us fix our eyes," he said, "on the Average Man, because in a popular government he is the man to whom everything is ultimately referred, upon whom everything ultimately turns. . . . Strictly speaking, there is no Average Man. . . . If, taking any group of men, we strike off ten per cent as exceptionally intelligent and ten per cent as exceptionally dull, and then try to find a description which is broadly or roughly true of the remaining eighty per cent in the particular aspect—here the civic aspect—in which they are to be studied, that will be a description of the Average Man. It will not be precisely true of any

[1] John M. Mecklin, *Introduction to Social Ethics*, p. 8.

one person in the eighty per cent, but it will be so far true that the range of variation between the extremes will be small; and it will, therefore, be true enough for most practical purposes."[1] The average man thus becomes what has been elsewhere termed the normal man.

The opinions of actual men

By thinking in terms of the average or normal man it is possible perhaps to disregard the opinions of the upper and lower tenths of the population and thereby to simplify somewhat the problem of public opinion. But that problem still involves an analysis of the opinions of four-fifths of the whole body of people, and among these four-fifths there remains the greatest diversity of interests. Moreover, individuals who share the same interests will attach very different degrees of importance to them. Of four men of identical color who belong to the same race, the same class, the same trade, and the same church, one may cherish his racial associations and interests above all others, another, the interests which he shares with the other members of his class, a third, the interests of his trade, and the fourth may put first his religion and the interests of his church. There is room among the people of a modern state for an unlimited variety of individuals, regarded in the light of their permutations and combinations of interests. It is impossible to visualize any particular one of them as the average or normal man, or to substitute his opinions for those of the whole body of people as a guide to the responsible statesman. Practical politicians do not much concern themselves with the opinions of theoretical men. Their business is with the actual men whose opinions will be supported by their influence and votes. The political scientist, like the politician, can not depend on abstractions, though he does well to know as much as he can about the normal man, and, more precisely, what the statisticians would call the median and modal man, in the several categories in

[1] Bryce, *op. cit.*, pp. 17-18.

which men may be placed on the basis of their comparative wealth, income, knowledge, intelligence, morality, and other characteristics. Above all he needs to know about actual men, for it is the activities of actual men, both in and out of public office, which constitute the process of government.[1] Public opinion is the opinion not merely of the average or normal man. It is the opinion action upon which is ungrudgingly acquiesced in by all men, or at least by all whom it concerns, and which they can check up, if necessary, by their own knowledge of a substantial part of the facts required for a rational decision.

The "interests"

The most cursory analysis of the whole mass of opinion which influences the rulers of a modern state indicates how little of it is truly public, and how much is the opinion of particular combinations or groups of men, of special interests, as people say. Groups of men, belonging to the same political community, are united more or less strongly by ties of race, color, social and economic condition, religion, occupation, trade or profession, locality, and so forth, and the members of such a group pool their resources, according to the felt importance of their common interests, in order to make their opinions most effective. The same man may and generally does belong to several such groups and consequently shares in the creation of several bodies of opinion, which compete for the attention of the political authorities and sometimes even conflict with one another. The special interests of different men always conflict with the special interests of others, and the activities arising out of these conflicts of interest unhappily absorb much of the energy of mankind. Amid this pressure of contending groups the rulers of men pursue their tasks. A state whose rulers can rely in a substantial measure on the support of a spirit of conscious devotion to the com-

[1] This idea is elaborated in an illuminating essay by Arthur F. Bentley, entitled, *The Process of Government, A Study in Social Pressures.*

mon good is built upon a firm foundation indeed; but whatever be the measure of that spirit among the people of a modern state, its rulers must also allow for the special interests of contending groups and the conflict of power with power. It is an indispensable condition of good government to establish an equilibrium of forces, assuring to each its due influence in the conduct of affairs and thereby preventing such an accumulation of stresses and strains at any point as would destroy the stability of the community.

The nature of popular government

Under a so-called popular government we may say that the people rule, but only in the sense that a comparatively few of them, temporarily vested with authority, are held to a course of conduct responsive not merely to the preponderant bodies of opinion in the community, but in due measure to all that are deliberately formed and substantial. Popular sovereignty, rightly understood, is a philosophical, not a juristic, concept. The governments of modern democracies are merely more or less popular according to the degree to which the preponderant opinion in the conduct of public affairs approximates true public opinion. How to bring about a closer approximation and how to infuse public opinion itself with the spirit of dispassionate reason and informed intelligence are among the foremost problems of popular government. But above all is the problem of the foundations of the state itself. James Madison, the leading architect of "the more perfect Union" under the Constitution of the United States, understood as well as any modern statesman the true nature of this foremost problem of popular government. "In framing a government which is to be administered by men over men," he wrote in the 51st number of *The Federalist,* "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself."

Its foremost problem

In order to enable the government to control the governed, it is necessary first to understand the nature of the

state itself. In order to oblige it to control itself, it is necessary to understand particularly the nature of the superior kinds of states, and above all that of the modern commonwealth. The purpose of the next chapter, therefore, is to point out the differences between the modern commonwealth and inferior kinds of states, and between states of every kind and other kinds of human organizations.

NOTES ON BOOKS

1. The study of the science of government may begin with a statement of the problem or with the definition of terms. A noteworthy example of the former method is afforded by the opening chapters of J. S. Mill's *Considerations on Representative Government* (1861). The latter method is well illustrated by Jeremy Bentham's *Fragment on Government* (1776), or Sir G. C. Lewis's *Remarks on the Use and Abuse of Some Political Terms* (1st ed., 1832; 3d ed., 1898). Nothing more than a beginning is possible, however, as Sir J. R. Seeley has convincingly shown in his *Introduction to Political Science* (1896), without a knowledge of the world which is to be governed and of the men who inhabit it. The science of government must be based on the sciences of psychology and of history. The approach to its study might logically begin, therefore, with J. H. Robinson's *The Mind in the Making* (1921), and J. T. Shotwell's *An Introduction to the History of History* (1922). But, if one would avoid going too far afield, there is still no better introduction to the problem of government, I think, than the appropriate portions of Plato's *Republic* and Aristotle's *Politics*.

2. Graham Wallas's *Human Nature in Politics* (1908) furnishes the best introduction to the modern psychological school of political scientists. See also his later books, *The Great Society* (1914), and *Our Social Heritage* (1921). The most serviceable recent treatise on the psychological conditions underlying political phenomena is J. M. Williams's *The Foundations of Social Science* (1920). An earlier book, still useful, is W. McDougall's *Social Psychology* (1908). The same writer's more recent work, *The Group Mind* (1920), seems to me to carry a figure of speech too far. See also R. M. Maciver's *Community, a Sociological Study* (2d ed., 1920).

3. The problem of popular government is clearly stated and discussed in A. L. Lowell's instructive volumes, *Public Opinion and Popular Government* (1913), and *Public Opinion in War and Peace* (1922), and in W. Lippmann's significant writings, particularly his *Public Opinion* (1922). Continuing the approach to the problem presented in A. F. Bentley's *The Process of Government* (1908), J. M. Williams's *Principles of Social Psychology* (1922), is the most noteworthy recent publication. Mention should be made also of Miss M. P. Follett's suggestive and stimulating book, *The New State, Group Organization the Solution of Popular Government* (1918; new impression, with introduction by Lord Haldane, 1920).

CHAPTER II

THE NATURE OF THE MODERN COMMONWEALTH

1

BEFORE considering further the problems of government, it is necessary first to examine the nature of the state itself and of the best kind of state that men have yet been able to organize, the modern commonwealth.

What is a commonwealth?

Some of the differences between a commonwealth and the more imperfect kinds of states were indicated by the father of political philosophy, Plato, in his epoch-making work, the *Republic,* and by the greatest political scientist of all times, Aristotle, in his masterly treatise on *Politics.* But the actual commonwealths with which those eminent thinkers were acquainted fell far short of measuring up to the standards which they prescribed, and were entitled to the name only by patriotic courtesy. Under the Roman Empire the very name of commonwealth fell into disuse, and had to be rediscovered by scholars at the revival of learning. In modern times the term has again come into use, but no clear distinction has been made between commonwealth and state. In common usage, the true arbiter of the meaning of words, both are employed in various senses, often interchangeably. Though many learned men, who have written on government and politics, have been at great pains to explain what they have meant by state and commonwealth, there is yet no agreement upon any settled definitions of the terms.

Origin of term, commonwealth

The English word, commonwealth, seems to have come into use in the sixteenth century, when men of learning in England first began to write in the vernacular of the realm

as well as in the scholastic Latin. It was the accepted translation of the classical expression, *res publica.* Thus the first English translation of Sir Thomas More's famous *Utopia,* which was originally written in Latin, regularly used the word commonwealth, wherever the author had written *res publica.* And Sir Thomas Smith, a learned and accomplished secretary of state under Edward VI and Elizabeth, writing in 1565 the first noteworthy description of the government of England in English, entitled his work *De Republica Anglorum,* but in the text he used the word commonwealth, and his work was usually cited by early readers as the "Discourse on the Commonwealth of England." The literal rendering of the Latin *res publica* eventually came to be employed for describing not a kind of state, but a kind of government, particularly the kind which the Roman Commonwealth possessed at the height of its splendor. Smith, though he was at great pains to prove that the government of England was not a simple monarchy, never described either the government or the kingdom itself as a republic. Commonwealth, indeed, was the word generally employed by English lawyers and statesmen in the age of Elizabeth to describe a well-ordered kingdom, such as patriotic Englishmen were bound to believe theirs to be. Our best witness is the illustrious Sir Edward Coke, who consistently used the word in that sense in his famous *Institutes of the Laws of England.* But at the time of the Civil Wars the word came to be particularly attached to the Puritan Commonwealth, in which the regicides erected a republican form of government on the ruins of the Stuart monarchy. After the collapse of the Cromwellian Protectorate, the disrepute into which all things connected with the cause of the Puritans promptly fell in England brought the good old word, commonwealth, into disfavor. In the American colonies its original significance survived, and at the Revolution the three largest States, Massachusetts,

Pennsylvania, and Virginia, incorporated it into the fundamental law of the land as the official designation for the body politic. But in England the word has remained under a cloud until very recent times.

Origin of term, state

The word, state, had a different origin. It was introduced into the literature of modern politics by the artful Italian politician, Machiavelli, who began his instructive and un-Christian work, *The Prince,* by observing that "all the powers which have had and have authority over men are states, and are either monarchies or republics." He derived it from the Latin *status,* from which we also derive our words, static, and stable, concepts of an entirely different order from that of *res publica.* Assuming that his readers were familiar with both monarchies and republics, Machiavelli gave no space to the elaboration of the nature of the state, but proceeded at once to expound his theory of statecraft. His assumption was doubtless correct, but the result was a definition of the state too indefinite for later generations, which wish a more precise idea of the fundamental concept of political science. Nevertheless, Machiavelli's terminology rapidly gained acceptance. In England Shakespeare, whose culture reflects the influence of the Italian Renaissance more than does that of diplomats like Sir Thomas Smith or jurists like Sir Edward Coke, used both terms, state and commonwealth, meaning the body politic, but the former much more frequently. After the Stuart Restoration in 1660 Machiavelli's expression drove the old English word, commonwealth, almost completely out of popular usage, though philosophers like Locke and Hume, and politicians like Bolingbroke and Burke might continue to use it occasionally. But the meaning of the word, state, was slow to emerge from the obscurity in which Machiavelli had originally left it.

What is a state?

This is shown by the subsequent history of the word. Lord Bacon, one of the earliest English political scientists

to use it, entitled a famous essay, *Of the True Greatness of Kingdoms and Estates.* State and estate are words which he used indifferently, indicating little difference in his mind between the two things. Indeed, his use of words reveals an abiding uncertainty whether to refer to bodies politic in general terms as states or estates or commonwealths, or more specifically as kingdoms, duchies, principalities, etc. During the seventeenth and eighteenth centuries, when more or less absolute monarchs of various ranks held sway in the principal countries of Europe, there was a growing need among political writers for a general term for all bodies politic. There was also a persistent confusion of ideas with respect to states and estates, which is thoroughly repugnant to the point of view of modern times. Voltaire, for example, an enlightened man, judged by the standards of his own time, is reported to have declared that "a state being a collection of lands and houses, those who possessed neither land nor house ought not to have any deliberate voice in the management of public affairs."[1] To this day the French word for state corresponds to the English estate. Yet no one to-day would identify the state with lands or houses or any other portion of the real estate within the geographical area over which the state exercises jurisdiction.

Identification of state and government

Many writers, however, seem disposed to identify the state with its government. Machiavelli himself made no clear distinction between the two. His main interest in *The Prince* lay in the methods by which men might acquire and preserve dominion over their fellowmen, and whether he meant by state only those men who rule over a body of people or both rulers and ruled together, he does not say. The famous words, *L'etat, c'est moi,* attributed to Louis

[1] Quoted by Mazzini in his *Thoughts on the French Revolution of 1789.* Cf. Joseph Mazzini, *The Duties of Man,* Everyman's Library edition, p. 268.

the Fourteenth, although not actually employed by him, fairly reflect the idea of the state, entertained by the Machiavellian statesmen of the age of absolutism.[1] They simply identified the state with themselves, or, strictly speaking, with their nominal sovereigns. Karl Marx, a more influential authority in modern times than Louis XIV, held a like opinion of the nature of the state. In the Communist Manifesto, published in 1848, he asserted that "the modern state is but an executive committee for administering the affairs of the whole capitalist class," a theory of the state now firmly established in the political philosophy of Marxian socialism.

Marx's view

Numerous writers since Marx have taken a similar view, though, excepting the socialists, they have generally not followed him in identifying affairs of state with those of the capitalist class alone. Sorel, for example, the radical French critic of Marxian socialism, realized from a longer experience with modern democratic politics that clever manipulators of popular majorities like Louis Napoleon and Bismarck and Disraeli were shrewder judges of human nature than Marx, and that the latter's simple economic interpretation of history afforded an inadequate explanation of the dominant forces in modern politics, and of the working of what the socialists call capitalistic statesmanship. The modern state, Sorel concluded, "is a body of intellectuals, which is invested with privileges, and which possesses means of the kind called political for defending itself against the attacks made upon it by other groups of intellectuals, eager to possess the profits of public employment. Parties are constituted in order to acquire the conquest of these employments, and they are analogous to the state."[2] Those who hold the views of

Sorel's view

[1] David J. Hill, *A History of European Diplomacy*, Vol. III, p. 25.

[2] Georges Sorel, *La Décomposition du Marxisme*, p. 53. Cited by Bertrand Russell, *Roads to Freedom*, p. 30. See also Sorel's *Réflections sur la Violence* (English translation, 1915).

Sorel would endorse as a scientific statement of the theory of politics Goldsmith's oft-quoted couplet:

> For just experience tells, in every soil,
> That those that think must govern those that toil.

A similar idea of the state has been held by conservative writers, seeking not to discredit it and thus promote the cause of revolution, but to strengthen and sustain its hold upon the allegiance of the masses of men. By no writer has this idea of state been set forth more elaborately than by the eminent French constitutional lawyer, Duguit, in a series of vigorous and graceful works.[1] Summarizing his theory of the state, he wrote: "My theory is realistic and positive. . . . One should never speak of the powers and of the duties of the state, but of the powers and duties of the rulers and their agents. To conform with common usage and on grounds of convenience, I shall often use the word, state; but it must be understood that the word means . . . the particular men who in fact hold sway."[2] Possibly this realistic concept of the state is that originally held by Machiavelli. Be that as it may, in modern times, as Duguit says, it renders the use of the word unnecessary. For that reason some writers of this way of thinking have more logically abandoned its use altogether. They speak only of the government, never of the state.[3]

Duguit's view

[1] See Leon Duguit, *Law in the Modern State,* a translation by Frida and Harold Laski, New York, 1919, and the works cited therein.

[2] Leon Duguit, *Manuel du Droit Constitutionnel,* p. 28.

[3] See Arthur F. Bentley, *The Process of Government; A Study of Social Pressures.* Chicago, 1908. Other writers have gone to the opposite extreme. Instead of reducing the scope of the concept until they have deprived it of all special significance, they have enlarged its content until it includes vaguely a great though indefinite portion of mankind. They have thus obscured the distinction between the state and human society itself. To some of these writers the state is a vast organism, comparable with respect to the relations between its members to colonies of ants or swarms of bees. Cf. Henry Jones Ford, *The Natural History of the State.* Princeton, 1915. But the modern state, however one may choose to speak of primitive institutions or primeval man, is no mere horde.

2

Bentham's definition of the state

A realistic definition of the state, more consistent with common usage and hence more serviceable for most purposes, is that which includes within the state the whole body of people, not only the rulers but also those who are ruled. Such a definition was worked out by the great English law reformer, Jeremy Bentham.[1] "When a number of persons," he wrote, "(whom we may style subjects) are supposed to be in the habit of paying obedience to a person, or an assemblage of persons, of a certain and known description (whom we may call governor or governors), such persons altogether (subjects and governors) are said to be in a state of political society." That is to say, they constitute a state. That which makes the body of people into a state, according to this definition, is the habit of obedience on the part of those who obey, and of authority on the part of those who are obeyed.

It is not necessary, however, that those who obey shall always obey in all things. A body of people may still constitute a state, even though all its members disobey their rulers in some things and some of the inhabitants of the land wherein they dwell disobey in all things. The United States does not lose its character as a political body or body politic, merely because most Americans at one time or another disobey a street traffic regulation, or even because some of them are felons, and certainly not on account of the presence within its borders of alien enemies or anarchists who deny absolutely the authority of its rulers. It is evident, however, that the more firmly established the habit of obedience is, the stronger will be the authority of the rulers, and that the weaker the habit of obedience, the more circumscribed and precarious the rulers' authority will be. It may become so restricted and

[1] Jeremy Bentham, *Fragment on Government,* Chapter 1, paragraph 10.

uncertain that the state loses its cohesiveness and the body of people dissolves into its constituent elements, leaving only political chaos or anarchy, or, as is more likely, falls under the dominion of more powerful rulers, capable of imposing their authority upon the reluctant people, and thus is merged into some greater state.

Limitations of realistic theory of the state

One problem which arises under this definition is that of determining exactly when a state ceases to exist, or comes into existence. Did Scotland, for example, cease to be a state when its hereditary king, James VI, became James I of England in 1603, and the two kingdoms were united under a common sovereign? Or did it retain its statehood until 1707, when its separate parliament was finally dissolved and Scotchmen received representation in the Parliament of England? Or is it still a state, since it has its own laws prescribing rules of conduct in many matters different from those of the other parts of Great Britain, and enforced under the supervision of a separate set of officers? And was Ireland a state while it retained its original parliament at Dublin? If so, did it cease to be a state when it was incorporated into the United Kingdom by the Act of Union of 1800? And if it did, was its statehood restored by the formal establishment of an Irish Republic and the refusal of the bulk of its inhabitants longer to recognize the authority of the British government, or by the subsequent creation of the Irish Free State under the nominal sovereignty of the British King?

And how is the existence of a state affected by changes in its form of government? Was Russia, for example, the same state under the provisional government, established by the Duma in the spring of 1917, as under the Romanoffs? If so, was it still the same state under Soviet rule, after the Bolshevist revolution in the autumn of 1917, as under the rule of Kerensky and the moderate Socialists? And would it have been still the same, had the Counter-

Revolutionists prevailed under Kolchak, Denikine, Kaledines, or Wrangel, and had the inhabitants acquiesced in the change of rulers as they appeared to do during the succession of revolutions which ended in the dictatorship of the urban proletariat under the leadership of Lenin and Trotzky? Again, was the Russia of the Romanoffs the same state after the secession of the Finns, the Esthonians, the Letts, and the Lithuanians? After the formation of the new Poland? And after the formation of other states of uncertain stability in the Caucasus, and in Siberia?

Apparently changes of rulers might continue indefinitely without destroying the state, if the people should, as a matter of fact, recognize the authority of the successive rulers and submit to their dominion. But the process of disruption by the secession of particular bodies of people from the original body could not continue indefinitely without so altering its original character as to make it unrecognizable. Since the dissolution of the Dual Monarchy and the disruption of both Austria and Hungary, where is the former Austrian state? Is German-Austria alone the true successor of the ancient Austria, or have the Hapsburg dominions been so dispersed among the various Danubian states which now exist, the Kingdom of the Serbs, Croats, and Slovenes, Czechoslovakia, Rumania, Hungary, and German-Austria, as well as Poland and Italy, to say nothing of the state of Fiume, that the identity of Austria has been utterly lost? Strictly speaking, any substantial change in the body of people who obey a common ruler may be said to constitute a new state, but for practical purposes it is probably enough to preserve the identity of a state that the bulk of its people should be the same before and after the change. Changes of rulers are of less consequence in determining the identity of a state. Whether, however, a state is bound by the acts of rulers whom its people have repudiated is another question.

Inadequacy of Bentham's theory

Bentham's realistic definition of the state is broad enough to include a wide variety of bodies politic. The American Union, for example, is a state, according to this definition, and so also are the forty-eight States which compose the Union. Whether such territories as Alaska, Hawaii, and Porto Rico, are also states in Bentham's sense of the term is not so clear. They have their local rulers, who are obeyed in most matters by the inhabitants, but who in their turn take orders from their official superiors at Washington. The peoples of the Philippine Islands are in a somewhat different position with reference to their local rulers and to the government at Washington, respectively, and those of the other overseas dependencies such as Guam and Samoa are still differently placed. Moreover, the United States maintains a peculiarly intimate relationship with certain states which are, nominally at least, completely independent, notably Cuba and Panama. The United States has also at times extended its special protection and friendly assistance to more or less unwilling peoples in Haiti, the Dominican Republic, and elsewhere, to say nothing of the protection which has been extended to Indian tribes, which once roamed in the American wilderness and now are settled upon their reservations in the West. Upon Bentham's theory of the state it is manifestly uncertain where the line is to be drawn between political communities which are real states and those which fall into the category of dependencies and other types of subordinate political community. The British Empire affords many illustrations of the same difficulty. Is the Dominion of Canada a state? Is the colony of Newfoundland a state? Is the province of Quebec a state? Is British India a state? Are the protected native states in India true states? And what about those similar bodies of people within the "spheres of interest," "spheres of legitimate aspiration," and "hinterlands," that once filled so great a

space upon the map of Africa? Common usage affords no clue to the answer. It is too hopelessly inconsistent. Bentham's definition is consistent but inadequate. It is founded on the data of politics, but it does not clearly explain the most important political phenomenon, the existence of states.

3

Austin's definition of the state

Evidently there is need for a definition of the state which without being less realistic, shall be more precise. An attempt to supply this need was made by Bentham's acute and subtle disciple, John Austin.[1] "If a determinate human superior," he wrote, "not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. . . . To that determinate superior, the other members of the society are subject. . . . The mutual relation which subsists between that superior and them, may be styled sovereignty and subjection. . . ." By an independent political society, therefore, Austin meant one consisting of a sovereign and subjects, as opposed to a political society consisting entirely of persons in a state of subjection. Thus arose the juristic distinction between sovereign and non-sovereign states. The essence of the state, according to Austin as well as Bentham, consists in the habit of obedience on the part of the bulk of its people to their rulers. Any organized body of people among whom such a habit exists is a kind of state. But the only perfect state, according to Austin, is the sovereign state.

The idea of sovereignty

Sovereignty is one of those unsatisfactory terms which, like state itself, has received various meanings at different

[1] Cf. John Austin, *The Province of Jurisprudence Determined* (1832), and *Lectures on Jurisprudence* (1869).

times and still conveys different ideas to men. It was introduced into the literature of political science by the influential French political philosopher, Bodin, in his epoch-making treatise, *De Republica,* first published in 1576, to describe the powers of the supreme ruler in the territorial states which were then struggling to establish their authority against the obsolete pretensions of the Holy Roman Empire and the more substantial claims of the late medieval Papacy. It seems to have been sometimes used, however, as by the great Dutch writer on the law of nations, Grotius, to designate the sovereign's estate or state. In this sense it came to mean an independent state, that is, one whose rulers possessed the powers ascribed to so exalted a ruler by Bodin and his successors. Even when, with the overthrow of absolute monarchy as a form of government, sovereignty in Bodin's sense of the term passed from single persons to more numerous bodies of people and became comparatively impersonal, the other use of the term remained. Abraham Lincoln, for example, used it in that sense in one of his messages to the Congress of the United States, in which he argued that the Southern States were not "sovereignties" and hence were not entitled to withdraw from the Union without the consent of the people of the United States. But in modern times the term has generally been employed to designate the most important attribute of a so-called sovereign state, not the state itself.

The problem of authority in the modern state

Sovereignty, as defined by Austin, is a relationship that can obtain only between one definite person or body of persons and the other members of the state. It implies the existence in the whole body of people of a single, recognized supreme authority. But the problem of authority in the modern state is not so simple.[1] Real men, unlike the hypo-

[1] See Harold J. Laski, *Authority in the Modern State,* and *Essays on the Problem of Sovereignty.*

thetical political animals of Austin's theory, are in the habit of obeying various authorities whose supremacy they recognize in their respective spheres of action. The state is only one of several organizations to which they may belong, and to the leaders of which they may duly acknowledge allegiance. The sovereign, as described by Austin, may be absolute, according to the juristic theory, but he is not omnipotent in the actual conduct of affairs.

Practical limitations upon legal sovereignty

This is most clearly evident in matters of religion. Christians have their Gospels, Mohammedans their Koran, and adherents of other creeds their sacred writings, by which they seek to rule their lives. Christians have the word of the Master Himself for the distinction between the things that are Caesar's, that is, political, and those that are God's and therefore not political but ecclesiastical. Everywhere the division of authority between civil and ecclesiastical dignitaries has a higher sanction than that of any temporal ruler. Temporal rulers may exercise both temporal and spiritual authority, but if they do so effectively, they must first have been recognized as head of the church as well as of the state. The limitation of the obligation to obey the authority of the state, which results from the existence of competing social and economic authorities, is less deeply rooted than that resulting from the existence of the church, but it is no less real. The officers of trade unions and of fraternal orders exercise within their respective fields an authority which often transcends that of the constitutional rulers of states. Coal miners, for instance, will persist in a strike duly called by their regular leaders, despite exhortations by governors and presidents and injunctions by courts of law. Political authority is only one kind of authority, and obedience to the rulers of states is only one aspect of a general phenomenon. In short, the facts of human obedience are too complicated to be satisfactorily explained by Austin's theory of sovereignty.

Inadequacy of all realistic theories of the state

The obvious limitations of the Austinian theory of sovereignty have caused much controversy concerning the soundness of the realistic theory of the state. It is evident that a sovereign state is a legal fiction. The reality is not the existence of the power of law-making unrestricted by any legal limit. It is the existence of rulers who have the ability to secure the consent of the governed to the exercise of their authority, or at least to command habitual obedience from the bulk of those over whom they seek to hold sway. The authority of actual rulers rests upon the facts of human nature and the circumstances under which they aspire to rule their fellowmen. It varies greatly in different states, and in the same state at different times. One of the powers of a legal sovereign is the power to tax. Jurists define the tax power as the power to take the property of a citizen or subject for public use without direct compensation. The power to tax may theoretically be exerted by the sovereign of a state to the limit where the citizen or subject has no property left. In the terse phrase of John Marshall, the power to tax involves the power to destroy. But it is rarely practicable for the rulers of men to press the power to such a limit. Their authority would be undermined by covert evasion or overthrown by open resistance. Statesmen know that, despite the fictions of the jurists, their powers are strictly limited by the character and disposition of the people of the state. The rulers of imperial Germany, flushed with the prestige of long-continued success, could wring vast sums from their spell-bound subjects for the support of the most extravagant enterprises; but, after the collapse of their empire, their republican successors were incapable of procuring from a dispirited people even the means of financing a frugal government, to say nothing of repairing the damage which the imperial forces had done. The realistic theory of the state is certainly sound enough, as far as it goes, but it is a

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superficial explanation of the data of politics and cannot satisfy the needs of statesmen.

Practical utility of the concept of legal sovereignty

Nevertheless, Austin's theory of sovereignty has been highly serviceable to modern lawyers and jurists. In the first place, it offers a convenient explanation of the nature and sources of the law.[1] Lawyers are prone to accept a purely empirical test for the authenticity of the law. English and American lawyers, for example, often define the law as the rules of conduct that will be enforced in the courts. This is a convenient definition for their purposes, but it is unsatisfactory to the jurist, because it compels him to find a definition for courts of law which does not in its turn depend upon a prior definition of the law itself. This it is difficult to do. A definition of law which is more satisfactory to jurists is that which identifies it with the rules of conduct enforced by authority of the sovereign of the state. A law, according to Austin, is a command issued by a sovereign person or body of persons to his or their subjects, or to one or more of them. To know the law in any state it is only necessary to know what person or body of persons has the supreme power to make, alter, or repeal the law, and to ascertain what rules of conduct have been prescribed by his or its authority. Regulations established by subordinate authorities and long-standing customs may also acquire the force of law, if not interfered with by authority of the sovereign, for what he tolerates he may be supposed to command.

The juristic theory of the state

Secondly, the concept of sovereignty supplies a convenient test for the existence of independent states. The rulers of states may recognize one another as possessing a power of lawmaking, unrestricted by any legal limit, and such recognition makes their respective states sovereign states under the modern law of nations. Supreme power, unrestrained by law, is, of course, not at all the same thing

[1] Cf. John C. Gray, *The Nature and Sources of the Law.*

as absolutely unlimited authority; for, if by definition there are no legal limits to the authority of sovereign rulers, there are practical limitations resulting from their knowledge of the limits of their subjects' willingness to obey and of the willingness of the sovereigns of rival states to recognize their authority. Nevertheless, a body of people, whose rulers are acknowledged by other rulers to possess sovereign power, becomes the subject of all those rights which states may exercise in their dealings with one another in accordance with the rules of international law. A state may be defined as a body of people who possess such rights. Such a theory of the state is best described as a juristic, rather than a realistic, theory. Rightly understood, it is a sound theory within its proper limits. These limits are clearly set forth in the writings of eminent jurists such as Westel W. Willoughby [1] among American writers, and Georg Jellinek [2] among Europeans.

4

Distinction between legal and political sovereignty

The political scientist, however, needs an explanation of the nature of the state which will be more substantial than the juristic theory as well as more instructive than the realistic. The fiction of legal sovereignty may be serviceable to lawyers and jurists, since they are not concerned with the objectionable measures that might be enacted by an absolute sovereign, if such a sovereign were so unwise as to press his authority to the juristic limit. They are concerned only with the laws which have actually been made. They wish to know merely which of the possible rules of conduct applicable to a particular case is authentic and therefore binding in the case. But legal fictions are

[1] See especially his *The Nature of the State* (New York, 1896), Chapter IX.

[2] See especially his *Allgemeine Staatslehre,* 2d edition (Berlin, 1905), Chapter VI, section 2C.

unsuited to the purposes of the statesman and the political scientist. The latter are concerned not only with what is the law, but also with what may be actually accomplished in the name of the law. The only sovereign they can afford to recognize is that which determines how much authority the legal sovereign actually possesses. This is the political sovereign of the state. Political, as distinguished from merely legal, sovereignty is not an unlimited authority. In the modern state the authority, not only of the constitutional rulers, but also of the people themselves in so far as they act politically, is substantially restricted by their disposition to recognize the distinction between the state and the various nonpolitical organizations of men, and to exalt the authority of the leaders of these latter within the fields deemed appropriate for their action. The recognition of the authority of natural law by those who claim natural rights in defiance of the authority of the state, as well as the recognition of the moral law, is equivalent to the establishment of limitations upon the authority of the political sovereign. Political sovereignty is not necessarily the same thing as public opinion, though it would be the same in a thoroughly popular state, but it is no less intangible and elusive. It is indeterminate except in terms of the purposes and will of the individual members of the state.[1]

The idealistic theory of the state

The nature of the state is determined not alone by the extent of the authority of its rulers, but also by the character of the purposes of its people, rulers and ruled together. It is what people seek to accomplish by means of the state that gives it distinction and sets it apart from other kinds of human organizations. Some writers, who have defined the state by the ends which it is designed to serve, have described those ends in the broadest terms. Of

[1] See James Bryce, "The Nature of Sovereignty," in his *Studies in History and Jurisprudence,* No. x, and also A. L. Lowell, "Sovereignty," in his *Essays on Government,* No. v.

these the most eminent is Aristotle. "Every state," he wrote, "is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims, and in a greater degree than any other, at the highest good." [1] Its purpose, in other words, was the fostering of the good life on the part of its members. But Aristotle was thinking of the contemporary city-state, and did not have to distinguish between so-called sovereign and subordinate political communities, as the modern writer must do, who has to take account not only of simple states, such as Uruguay or Finland, but also of highly complex composite states like the British Empire. Moreover, he overlooked the distinction between church and state. This was not a serious fault under the conditions that prevailed in ancient times, but it is an insuperable obstacle to the acceptance of his definition to-day. The ends which the modern state is designed to serve must be more precisely defined.

American version of the idealistic theory

The proper ends of the state, as understood by the American people at the time of the Revolution, were set forth explicitly or by plain implication in the Declaration of Independence and in the other great state papers of the period. The Declaration itself does not stop to consider explicitly the purpose of the state, or body politic, as people used to say in those days, but proceeds at once to describe the function of government in the state. "Governments are instituted among men," Jefferson wrote, to secure "certain inalienable rights" with which men are "endowed by their Creator," and among which are "life, liberty, and the pursuit of happiness." "Whenever any form of government becomes destructive to these ends," he con-

[1] *Politics*, Book I, section I, paragraph I.

tinued, "it is the right of the people to alter or abolish it." Evidently the state itself, at least in the opinion of the people for whom Jefferson was writing, existed for the purpose of supporting a government which would secure these ends. A more definite statement is contained in the preamble to the most deliberate of the American declarations of rights, that prefixed to the Massachusetts Constitution of 1780. "The end of the institution, maintenance, and administration of government," according to the quaint but precise wording of this notable document, "is to secure the existence of the body politic, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life." The body politic itself, the preamble goes on to say, "is formed by a voluntary association of individuals. . . . The whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." Regarded as an explanation of the origin of states in general, this is historically false. But it is the best possible evidence of the purposes of the particular people who chose to form that particular state. They were seeking the power to enjoy in safety and tranquillity their natural rights and the blessings of life.

Preamble to the Constitution of the United States

Yet even this statement of the purposes of the people of the state is not definite enough. There is too much room for differences of opinion concerning the nature of natural rights and the kinds of blessings which states may properly be expected to bring to their peoples. The framers of the Federal Constitution of 1787, doubtless realizing the need for greater precision in the statement of the ends of government, after declaring in the preamble their immediate purpose to form a more perfect Union, that is, to organize their body politic more soundly and give it a more effective government, specified the ulterior objects of

their association as follows: (1) to establish justice, (2) to insure domestic tranquillity, (3) to provide for the common defense, (4) to promote the general welfare, and (5) to secure the blessings of liberty to themselves and their posterity. This is the final statement of the ends for which the American Commonwealth exists.

Final statement of the idealistic theory of the state

Every state exists in order that its people may, to some extent at least, accomplish these ends. A state, therefore, in the most general meaning of the term, may be defined as a body of people organized for the purpose of accomplishing these ends. Such a body of people will occupy a more or less clearly defined territory, though it need not enjoy the exclusive possession of any territory. The people of a federated state, for example, share the possession of their territory with the whole body of people of the federation or union to which they belong. Nevertheless, they may constitute a state. Moreover, such a body of people must possess a government, for without a government they are not an organized body. But the essential possession is a common purpose. That is what constitutes the basis of their union and the test of their existence as a distinct political entity. If the consciousness of this purpose is widely spread through the whole body of people and deeply rooted in the minds of all, the state may be termed a commonwealth. To the extent to which the consciousness of a common purpose falls short of being the possession of all, the state falls short of being a true commonwealth.

Definition of the modern commonwealth

The modern commonwealth, therefore, may be most conveniently described as that species of state, in which the consciousness of a community of purpose is relatively widespread and deep-rooted among the people. States in which such a community of purpose is dimly understood by the masses of men, and in which the fact of obedience to the authority of the rulers is more manifest than the reason for it, are not worthy of the name of commonwealth. But

even in such states there must be some trace of a purpose, at least on the part of some of the people, to accomplish the ends which signify the existence of states. Otherwise the body of people do not constitute a state. They are slaves, blindly obeying their master. The latter does not rule a state, he merely manages a private domain.

Comparison of idealistic and realistic theories

This definition of the state may be termed the idealistic, since it finds the essence of the state in the existence of certain ideas in the minds of the people, or a portion of them, which furnish the basis for their union and determine the objects which they as an organized body shall pursue. It is a radically different concept from that underlying the realistic definition, which finds the essence of the state in the existence of a habit of obedience, regardless of the purposes for which the authority of the rulers may be used or the means which they may employ to accomplish their purposes. The state, so defined, may be distinguished from subordinate political communities, such as municipalities, parties, etc., by the fact that in the opinion of at least the dominant portion of its members it possesses the first claim to their allegiance, and its regular officers the first claim to their obedience, in so far as may be necessary and proper for the accomplishment of its purposes. It may be distinguished from non-political organizations, such as churches, fraternal orders, trade unions, etc., by differences in the nature of the ends which they serve or in the means which they may employ to achieve their ends. For example, a state may be distinguished from a church by the fact that the former exists primarily to serve the temporal needs of men, the latter, their spiritual needs. Futhermore, the authority of the latter, when challenged by disobedient members, must ultimately be sustained by spiritual sanctions; that of the former may, if necessary, be supported by physical force. But the basis of the state, like that of the church, is in the last analysis not force, but opinion.

Idealistic theory and the problem of sovereignty

The idealistic theory of the state supplies no solid foundation for distinguishing between sovereign and non-sovereign states. That distinction, indeed, is one which can properly be made only in pursuance of the juristic theory of the state. To the jurist legal sovereignty is the most important attribute of the state. The international lawyer, for example, is bound to ascertain who is the possessor of legal sovereignty in a state which presumes to act as a free and independent member of the family of nations. If none can be found, he must place that particular political community among the dominions, federated states, protected states, colonies, or dependencies of other kinds which are subject in a greater or less degree to the authority of some juristically sovereign state. But statesmen have to take a broader view of the nature of the state. They are concerned with political, as well as with legal, sovereignty. They must know, not merely what is lawful for them to do, but also what is practicable. This they can know only by knowing what is going on in the minds of their peoples. The political authorities to whom a people will finally look for the establishment of justice, for the insurance of domestic tranquillity, for provision for the common defense, for the promotion of the general welfare, and for securing the blessings of liberty, are the authorities of a politically sovereign state.

Comparison of idealistic and juristic theories

Such a state forms a political community whose character may gradually change as its people put more and more trust in one or another set of authorities. Time was when the people of Massachusetts or Virginia looked first to the authorities of their separate Commonwealths for the accomplishment of their political purposes. Gradually, more rapidly indeed after a time in Massachusetts than in Virginia, they transferred their confidence largely to the authorities of the Union. Long before the jurists could agree concerning the location of legal sovereignty in the

Union, a majority of the people had recognized the transformation of political sovereignty. Americans are not yet ready to put much trust in the authorities of any so-called superstate, such as the League of Nations. Those peoples who do look to the latter for some of the services which statesmen can render are laying the foundations for a new commonwealth, greater and perhaps ultimately more serviceable than any which has preceded it. Its future must depend not on the theoretical refinements of jurists, but on the actual opinion of it which the peoples of the world shall eventually hold. The jurist can tell whether or not what the Covenant of the League terms "fully self-governing states or dominions," such as Haiti or the Dominion of Canada, are sovereign states. The political scientist need know only that as a matter of fact they are or might be members of the League. The modern commonwealth is defined by the actual purposes of its people, not by the legal authority of its rulers.

Distinction between the commonwealth and the inferior kinds of states

It is not easy to determine just where the line should be drawn between bodies politic which may fairly be described as commonwealths and the inferior kinds of states. No state is so completely devoid of purpose on the part of its people that the habit of obedience to the established rulers is wholly subconscious and non-rational. No commonwealth is so thoroughly animated by conscious rational purposes that the authority of its rulers is not dependent in some degree upon the action of casual impulses and blind instincts. Any particular state or commonwealth is in some sort a mean between the two extremes: on the one hand, a purposeless state, in which only the rulers deliberately pursue a conscious end, while the subjects obey from the force of a habit which they do not understand and the existence of which they may not even perceive; and on the other hand, a purposeful commonwealth, in which all authority is sustained by the will of the people and no

ruler may pursue any end that is not common to all. Contemporary bodies politic which incline toward the latter extreme may be designated as commonwealths; the rest are inferior kinds of states. Certainly, however, if the obedience of the masses of the people is not rendered ungrudgingly, the state is no commonwealth.

5

Classification of states and of commonwealths

It is easier to ascertain what theoretically constitutes a commonwealth than to determine which of the existing states in the world are commonwealths. For example, the constitutions of the twenty republics of Latin America were all formed more or less in conscious imitation of the North American model. But even the most ardent admirers of the Latin American genius will hardly contend that all these states should be put together in the same class. Hence they cannot all be equally commonwealths. Bryce, who among modern political scientists of the first rank made the closest study of the Latin American republics, divided them into three classes. The first consisted of those in which republican institutions, purporting to exist legally, were a mere farce, the government being in fact a military despotism, more or less oppressive and corrupt, according to the character of the ruler, but carried on for the benefit of the executive and his friends. As the most conspicuous example of this class Bryce specified the so-called republic of Haiti. The second class included countries where there was a legislature which imposed some restraint upon the executive, and in which there was enough public opinion to influence the conduct of both legislature and executive. In these states the rulers, though not scrupulous in their methods of grasping power, recognized some responsibility to the people and avoided open violence and gross injustice. Bryce cited Mexico, as it was under Diaz before the recent revolu-

tions, as the best example of this class. Mexico, incidentally, possessed a constitution which declared most explicitly that the Mexican people recognized the rights of man as the foundation of the state and their preservation as the primary object of government.[1] The third class of Latin American states, according to Bryce, were "real republics," that is, commonwealths, in which authority had been obtained under constitutional forms, not by armed force, and where the machinery of government worked with regularity and reasonable fairness, laws were passed by elected bodies under no executive coercion, and both executive and judicial work went on in a duly legal way.[2] Bryce did not attempt to assign all the Latin American republics to their proper places in this classification, but it is evident that in his opinion the South American states within the southern temperate zone were "real republics." They are entitled to a place among the world's commonwealths.[3]

Relation between kind of state and form of government

It is evident that there is no fixed relation between the kind of state and the form of government. The majority of the Latin American republics must be excluded from the class of commonwealths, notwithstanding the republican form of their governments and the democratic character of their written constitutions. These constitutions, to use Clemenceau's apt expression, too often have only a "chiefly theoretic authority."[4] Their democracy exists in name,

[1] Constitution of 1857, Title I, section I, paragraph I.

[2] James Bryce, *South America,* 2d edition (1913), pp. 541-542.

[3] Another well-informed observer of Latin American affairs, Professor W. R. Shepherd, has also divided these twenty republics into three classes. Although he has not explained the basis of his classification, it is apparently similar to that of Bryce. His classification follows, the best class being first: (1) Argentina, Brazil, Chile, Costa Rica, Uruguay; (2) Bolivia, Colombia, Cuba, Mexico, Panama, Peru, Salvador, Venezuela; (3) Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Paraguay. See his *Latin America,* p. 94. This classification was published in 1914 and doubtless in certain cases would now, in the light of subsequent events, have to be altered.

[4] See his *South America To-day,* Paris, 1911.

but not in fact. On the other hand, states which do not possess the republican form of government, if by republican is meant governments in which the executive head is elected by the voters or their representatives, may be commonwealths, like Norway and Denmark. There may even be a commonwealth, where there is little trace of popular government. Puritans have claimed that Cromwell's rule was of this character; proletarians have made the same claim for the rule of Lenin in Russia; and the bourgeoisie, for that of Louis Napoleon in France under the Second Empire. But in general autocratic "protectorates," military "dictatorships," and Caesarian "democracies," leave too much to be desired. Bryce in his masterly study of modern democracy pronounces the two best administered democracies in the modern world to have been two of the poorest, in wealth at least, the Orange Free State before 1899 and the Swiss Confederation.[1] And in general the most favorable conditions for a commonwealth are, in his judgment, poverty and small size.[2] It is not, however, the conditions that make the commonwealth, but the ideas that lie in the minds of the people. Theoretically, at least, these may be present to such an extent as to justify the classification of a state among the commonwealths, even if the state have a numerous population, an extensive territory, vast accumulations of wealth, and a government monarchical in form.

Ideal commonwealths

Certain writers indeed, including some of high authority, have been of the opinion that the most perfect commonwealth would be found under the government of an absolute monarch. Among modern writers Hobbes is the principal authority for this notion. His arguments in favor of absolutism, and the grounds of his preference for monarchy over any other form of government, were

[1] *Modern Democracies,* Vol. II, pp. 457-458.
[2] Cf. *Ibid.,* Vol. II. pp. 444-445.

elaborately set forth in his famous book, *The Leviathan,* published in 1651. Among the ancients of a similar way of thinking the most noteworthy is Plato. Like Hobbes, he was a supporter of absolutism, but he preferred aristocracy to monarchy. His ideas are worthy of special consideration.

Plato's Republic

The ideal commonwealth, according to Plato, was one in which the supreme power is vested in those best fitted by nature and education to govern the rest. Only philosopher-kings, he thought, were fit for such a responsibility. The number who would share in the supreme power would be few or many, depending solely on the number of those who might possess the necessary qualifications. The essence of his ideal commonwealth, or aristocracy, consisted not in the number of the rulers, or the form in which they might organize their government, but in the use of their great authority wisely and with single-minded purpose for the common welfare of the whole body politic. The proof that a particular state was an aristocracy would be the maintenance of the most harmonious relations between all the parts of the body politic, that is, between the several classes of people composing the whole community. Each class must perform its proper function as a member of the body politic as unconsciously and efficiently as the members of the human body perform their several functions. Whether or not the inferior classes, that is, the masses, understood the ends of the state and the true grounds for the obedience claimed for it by its rulers, the philosopher-kings, was a matter of small moment. Plato even suggested that the aristocrats who were to rule his ideal state might secure the consent of the governed for their enterprise by some "magnificent fiction," playing upon the credulity of their subjects, rather than appealing to their reason. It is evident that Plato's ideal commonwealth cannot satisfy the test of a modern commonwealth.

It is not enough that the state exist for the good of all the people. The consciousness of the purpose of its existence must also be widespread and deeply rooted in the minds of the people themselves.

Plato's classification of states

But Plato's classification of states is still of value. Besides the perfect aristocracy he distinguished four types of imperfect states. First, there was timocracy, that type of state in which the sense of honor was excessively keen. In such a state, he thought, an undue disposition prevailed to use force and violence in the conduct of public affairs. Rulers in a timocracy would rely for the maintenance of their authority too much upon main strength instead of wisdom, as in the true aristocracy. This is what we would term to-day a militarist state. Secondly, there was oligarchy, that type of state in which the love of money was excessively strong. In such a state, he thought, an undue disposition prevailed to favor the interests of the rich. Authority would repose too largely upon economic power. This is what we would now term a capitalist state. Thirdly, there was democracy, that type of state in which the desire for equality was carried too far. In such a state an undue disposition prevailed to favor the interests of the poor. Authority would repose too largely upon the mere force of numbers. This is what we would now term a proletarian state. Finally, there was tyranny, that type of state in which there was little regard for any interests except those of the rulers themselves. In an extreme form such a state would be no state at all, but anarchy. It should be observed that this classification of states is wholly independent of any classification of governments. The number who share in the government under any of these types might be few or many. The basis of the classification is the nature of the opinion which dominates the state. Such a classification is as significant to-day as it ever was, but the assignment of existing states to their

proper places therein need not be attempted here. It is enough to point out that any of these types, except perhaps the last, might be a modern commonwealth.

Other subjective classifications of states

Doubtless it is fairer to judge the character of states by the results which their rulers obtain rather than by the supposed motives underlying their conduct of affairs, as we judge a tree by the fruit thereof. There are many criteria of the well-being of states, which might be used for purposes of comparison, notably, (1) population, especially the rate of increase thereof; (2) wealth and income, total and *per capita;* (3) activity, measured by the consumption of, say, sugar and pig iron; and (4) intelligence, measured by degree of literacy or better by the use of books and other printed matter and of the means for the transmission of intelligence. But none of these measures accurately the real character, or even the degree of happiness, of a people.

Classification by death rates

If a single criterion of well-being is to be chosen, the most eligible is probably the death rate. For various reasons the rates for the period immediately preceding the World War are still the most suitable for the purpose of such a classification. Those states which possessed sufficiently reliable vital statistics may be classified upon this basis as follows: (1) states with a mean annual death rate of less than ten per 1000 inhabitants; (2) those states with a rate of from ten to fifteen; (3) those with a rate of from fifteen to twenty; (4) those with a rate of from twenty to twenty-five; (5) those with a rate of from twenty-five to thirty; and (6) those with a rate exceeding thirty. The classes are: (1) New Zealand; (2) Australia, the Scandinavian states, the Netherlands, Great Britain, and Uruguay; (3) Belgium, Switzerland, Germany, the Argentine Republic, Finland, Ireland, France, Italy, and Portugal; (4) Spain, the Balkan states and those of the Danube valley except Rumania; the most salubrious of the

Central American states, Costa Rica; and presumably also some of the other European and American states besides those already mentioned, though the evidence is incomplete, and Japan; (5) Rumania, Ceylon, and doubtless others for which data are lacking; and (6) Russia, Mexico, and many others which have not attempted to compile vital statistics. The United States has no reliable vital statistics for the Union as a whole, but figures are available for many of the States in the North and West and for a few in the South. The State of Washington and probably much of the Northwest falls in the first class with New Zealand. Many of the Northeastern and Central States fall in the second class. Apparently the Southern States would generally fall in the third or some inferior class. Judged by this test, the character of the states in the first two or three classes is substantially higher than that of the others. Among these classes the modern commonwealths would mainly be found. But too little is known about the happiness of peoples to permit any definitive classification of states upon a subjective basis.

Objective classifications of states

An objective classification of states is much easier. One such classification is that adopted by the Universal Postal Union as the basis for the assessment of its expenses upon the member-states. This was originally adopted by the League of Nations for the same purpose, but found inequitable. The most recent and authoritative is that adopted by the third Assembly of the League of Nations, which met at Geneva in September, 1922, on the basis of the estimated ability of the member-states to pay their respective shares of the cost of maintaining the League. This classification takes into account population, accumulated wealth, natural resources, the native ability and enterprise of peoples, the financial condition of governments, and other pertinent conditions. Fundamentally, it is a classification on the basis of power. It is as follows:

Scale for the Allocation of the Expenses of the League of Nations for the Year 1923

Units of Expense	States
95	British Empire*
78	France*
73	Japan*
65	China,* India
61	Italy*
40	Spain*
35	Argentina, Brazil,* Canada, Czechoslovakia
31	Rumania
26	Australia, Serb-Croat-Slovene State
25	Poland
20	Netherlands
18	Sweden*
15	Belgium,* Chile, South Africa, Switzerland
12	Denmark
11	Norway
10	Finland, Greece, New Zealand, Peru, Portugal, Siam
9	Cuba
7	Bulgaria, Colombia, Uruguay*
6	Persia
5	Bolivia, Venezuela
4	Hungary, Lithuania
3	Esthonia, Latvia
2	Haiti
1	Albania, Austria, Costa Rica, Guatemala, Honduras, Liberia, Luxemburg, Nicaragua, Panama, Paraguay, Salvador

It may be noted that the British Empire as a whole, including those dominions and dependencies which are

* Represented on the Council of the League.

member-states of the League, pays 246 out of a total of 979 units of expense.

1. The Powers

The fifty-two states which are members of the League of Nations and which have been classified therein on the basis of comparative power, as shown above, may conveniently be described as Powers. But they are not the only Powers. All those existing states which have ever been invited to participate in an international conference on matters of world-wide concern may with equal propriety be termed Powers. The most significant conferences of this character before the World War were the two Hague Peace Conferences, and the states which attended one or both of the Hague Conferences, but have not become members of the League of Nations, are the following: the United States, Germany, Russia, Turkey, Mexico, Ecuador, and the Dominican Republic. These seven states, together with the fifty-two states which are members of the League, comprise the whole family of Powers in the modern world. The standing of some of them as Powers is manifestly precarious. In view of the actual differences among them with respect to influence and prestige, they may well be divided into three subclasses, World Powers, Regional Powers, and Local Powers.

A. World Powers

The first comprises those which command the greatest physical force and enjoy the highest prestige. They possess permanent seats in the Council of the League of Nations, or, if not members of the League, wield an influence which makes it very difficult to dispose of matters in which they are interested without their expressed consent and approval.

B. Regional Powers

The second comprises those Powers whose influence in matters concerning the region in which they are most active is great, though their activities do not pervade all parts of the globe. Notable examples of Regional Powers are the A. B. C. Powers, so-called, of South America—Argentina, Brazil, and Chile. Local

C. Local Powers

Powers are those whose activities and influence are mainly confined to their own respective localities. Among them indeed are some, like Albania and Liberia, and certain of the Latin American states, which are Powers only by courtesy.

2. Other independent states

In addition to the Powers, there are a number of states which have not asserted or succeeded in maintaining a place at international conferences and yet have been able to manage their own affairs without becoming so dependent on the assistance or protection of any of the Powers as to forfeit their claim to recognition and respect among the independent states of the world. These subordinate independent states, as listed in the latest edition of the *Statesman's Year Book,* are the following: Abyssinia, Afghanistan, and the Indian border states of Bhutan and Nepal, Armenia and the Caucasian states of Azerbaijan and Georgia, Hejaz and the other Arabian states, Iceland, Liechtenstein, Monaco, and San Marino. Morocco, though somewhat doubtfully it would appear, is placed in the same category. Some of these states, such as Iceland and Liechtenstein, exist in close association with one or another of the Powers. Others, such as Monaco and San Marino, maintain a traditional independence which their small size makes it not worth while to challenge. They are in fact, if not in form, under the protection of neighboring Powers. Others still, such as Armenia and the other Caucasian and Arabian states, have secured their independence too recently and have found their new freedom too precarious, to entitle them to any certain place in the family of Powers. Several of these states, to be sure, have applied for admission to the League of Nations, and one of them, the Kingdom of the Hejaz, was even for a short period a member of the League, but their size was too small, their boundaries too uncertain, their governments too unstable, or their purposes too obscure,

to enable them to qualify for active participation in world politics. Some of them, however, might seem better entitled to a place among the Powers than certain of the so-called Powers themselves. Indeed the line of demarcation between the Powers and the other independent states is very indistinct.

3. Dependent states

On the other hand, the class of subordinate independent states also merges almost imperceptibly into that of the dependent states. The independence of Abyssinia, for example, was for a time contested by one of the World Powers; that of Afghanistan was long menaced by two of them. Both, however, have succeeded until now in preserving their native authority; but Morocco, which was likewise long threatened by the designs of the World Powers, waged a fitful struggle for a dubious autonomy. Others, less or more fortunate, depending on the point of view, have been too inert or too defective in organization to maintain their independence of the Powers. Among these dependent states there are also several classes.

A. Protected states under mandate of the League of Nations

First, there are those which have been placed under the protection of the League of Nations by what is called for convenience a mandate of the first class. Their peoples occupy territories which, as a consequence of the World War, have ceased to be under the sovereignty of the Powers which formerly governed them, and yet are not deemed able to stand by themselves under the strenuous conditions of the modern world. Their existence as independent states can be provisionally recognized by the greater Powers, subject to the rendering of administrative assistance and advice by a mandatory, designated by the League of Nations, until they are able to stand alone. The well-being and development of such peoples under the tutelage of the mandatory is declared to be a "sacred trust of civilization," and the mandatory is regarded as exercising its authority as an agent of the civilized Powers

constituting the League.[1] Certain communities formerly belonging to the Ottoman Empire are explicitly recognized in the Covenant of the League of Nations as members of this class, namely, Palestine, Syria, and Mesopotamia, or, as it is now called, Iraq; and the wishes of their peoples are declared to be the principal consideration in the selection of a mandatory. These protectorates of the League of Nations may be regarded as subjected temporarily to its authority on account of their disorganized condition, and presumably under a stable régime, affording adequate scope for the energies and intelligence of their peoples, they will obtain a higher rank in the political world.

B. Other protectorates

The other protected states fall into a sub-division by themselves. There has been less pretense that the wishes of the people of these protectorates were consulted in the selection of a Power to protect them, or that the authority of the protecting Power would be exercised in trust for civilization and only until such time as they should be able to stand alone. Egypt, for example, once an acknowledged dependency of the Ottoman Empire, fell within the sphere of influence of France and Great Britain after the construction of the Suez Canal. In consequence of the native inertia of her people and of their defective political organization, the Egyptian rulers were obliged to submit to French and British authority in so far as was deemed necessary and proper for the safety of the Canal. Eventually French indifference threw the "white man's burden" of maintaining order in Egypt upon the shoulders of the British, who, despite the nominal suzerainty of the Sublime Porte, sent an "Adviser" to reside at the Egyptian capital and offer his services to the native rulers. The latter were constrained by circumstances to accept his "advice," whenever tendered, and after the outbreak of the World War the anomalous situation was terminated by

[1] Cf. Covenant of the League of Nations, Article XXII.

the formal proclamation of a British protectorate. This is the most conspicuous instance of a general practice which in modern times has brought many an African and Asiatic state under the "protection" of one or another of the World Powers. In many cases, illustrated by the action of the British in parts of India or of the French in Madagascar, a protectorate has been a preliminary step toward openly avowed annexation and reduction to the rank of an ordinary dependency. In other cases, as in that of the British in Egypt, the trend may be in the contrary direction, like that of first-class protectorates of the League of Nations, toward a more independent status.

C. Dependent states under League mandates of the second or third classes

The ordinary dependencies, like the protectorates, fall into two sub-classes. First, there are those peoples, once subject to the authority of the German or Turkish Empires, who are at such a stage in their development that their existence as independent states was not even provisionally recognized by the Principal Allied and Associated Powers, who dictated the Treaty of Versailles. The rendering of administrative assistance and advice by an "advanced nation," to borrow the expressive language of the Covenant, was deemed an inadequate security for their well-being and development. In such cases one of the Powers assumes responsibility for the actual administration of the territory, under various conditions depending upon the nature of the particular case. In some cases, notably in Central and Eastern Africa, an attempt is professedly made to guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals; to prohibit abuses such as the slave trade and the arms and liquor traffic; to prevent the establishment of fortifications or military and naval bases and the military training of natives for other than police purposes and the defense of their own territories, and to secure equal opportunities for the trade and commerce of all the members

of the League.[1] In other cases, as in Southwest Africa and in Polynesia, the restraints upon the authority of the Mandatory to which the territory is assigned are less explicit, though the paramount authority of the League of Nations is expressly preserved.[2] This authority, as was demonstrated at the third Assembly of the League, makes a real difference between this kind of dependency and ordinary dependencies.

D. Other dependencies

For the most part ordinary dependencies seem to have been administered prior to the World War without pretense that the interests of the inhabitants were paramount to those of the dominant World or Regional Power or that there should be equal opportunity for the trade and commerce of all the Powers. In general, whether the imposition of restraints upon the brutal exploitation of dependent peoples in the backward regions of the world by the dominant Powers is accomplished directly under the auspices of the League of Nations, as in the case of the former German East Africa or Kamerun, or indirectly under the influence of the benevolent sentiments of civilized mankind, as in the case of what was once called the Kongo Free State, when ruthlessly exploited by the King of the Belgians, is a matter of secondary importance. Of greater importance is the character of the dominant Power itself. The Powers which now possess African, Asiatic, or Polynesian dependencies, whether subject or not to the supervision of the League of Nations, are the following: Great Britain, France, Japan, Italy, Spain, Australia, the Netherlands, Belgium, the Union of South Africa, New Zealand, Portugal, and the United States. But here we reach the end of the list of states. The governable inhabitants of the dependencies of the imperial Powers do not constitute states,

[1] League of Nations Mandate, Class II.
[2] *Ibid.*, Class III.

though they may often wish to do so, and may eventually succeed in doing so. The ungovernable inhabitants, that is, those ungovernable by the dominant Power, may form barbarous or savage tribes, not altogether destitute of the rudiments of political authority, but with such primitive states the modern commonwealth has only a remote relationship.

Classification of states by their credit ratings

Another objective classification of states, a highly practical classification in this capitalistic age, is that which arranges them in accordance with the credit which their governments enjoy in the money markets of the world. The public credit of those bodies politic which have any credit whatever may be estimated on the basis of the ratings of their securities, as fixed by financial experts.[1] The ratings which are used in the following classification of states are based upon the supposed security of public loans issued by authority of the governments of the several states. External loans, payable in dollars, generally receive a higher rating than other types of security. Those obligations are rated Aaa, which are considered to be investments of the highest degree of security. Aa is applied to those obligations which are investments of a high degree of security. All other obligations which are deemed investment securities are rated A. The B rating likewise is divided into three sub-classes, comprising the various obligations which are considered to be speculative investments. The governments which have issued the securities, receiving this rating, have defaulted at some time the payment of principal or interest, or seem likely to do so. The C rating is applied to those obligations which are regarded as speculations. The bonds receiving this rating are in default with respect to income or principal. Caa indicates that there is some prospect of the resumption of payments; C indicates that

[1] See Moody's Rating Book Service, *Governments and Muncipals,* 1922.

their ultimate redemption is hopeless. In most cases different obligations of the same state receive a different rating according to the nature of the security which they offer.

1. States with good credit

On the basis of these ratings it is possible to classify most of the states of the world as: (1) states with good public credit; (2) states with uncertain credit; and (3) states with bad credit. In the former class there are the United States, Great Britain, and the British overseas Dominions and Dependencies including India, and France, Belgium, the Netherlands, the Scandinavian states, Switzerland, Argentina, and Japan. In this class there are also certain other states, whose credit is good, though not so high as the foregoing, notably, Italy, Spain, Brazil, Chile, and Uruguay. India falls into this part of the class, as well as certain other states which doubtless, like India, owe their rating in some degree to the protection of one or more of the World Powers, notably Egypt, Cuba, and the Dominican Republic. Panama, doubtless because of her extraordinarily intimate relation with the United States, receives a higher rating. Brazil, on the other hand, falls close to the border line between this and the next lower class, since it is only those of her obligations which are re-enforced with some special security that receive an A rating. The obligations of the Dominican Republic would certainly not be rated high but for the guarantee of the customs administration under the supervision of the United States.

2. States with uncertain credit

The second class comprises a number of states whose credit would be much more uncertain but for the support of wealthier Powers, notably China, Persia, and Greece. Here fall also Czechoslovakia, Portugal, and a large number of the Latin-American states, including, somewhat doubtfully perhaps, Mexico. Liberia falls in this class, and Finland, and several states whose credit, once higher,

was impaired by the Great War, notably Rumania, the Serb-Croat-Slovene State, and Bulgaria.

3. States with bad credit

Other war-born or war-crippled states fall in the lowest class, notably Poland, Germany, Austria, Hungary, and Turkey. Here also must be placed certain other financially weak states such as Haiti, Honduras, and Paraguay. Soviet Russia, which repudiated all the outstanding Russian public debt, is not rated at all. Manifestly, a classification of states on the basis of their public credit under prevailing conditions throws less light upon their real characters than the classification adopted by the League of Nations or that based on death rates. In a purely capitalistic age it might be more significant than the others, but it is obvious that the standing of the states in the world to-day is largely determined by other forces than mere money power. Nevertheless, the modern commonwealths will probably be found chiefly in the class of states whose credit is good.

Russell Sage Foundation's classification of American States

A more instructive classification for the purpose of distinguishing between the commonwealths and the inferior kinds of states would be one which arranged them in accordance with the intelligence of their peoples. But the data for such a classification are lacking. It would be possible to gather statistics of literacy and grade many of the Powers accordingly, but literacy statistics are an unsatisfactory index of the intelligence of peoples. A more satisfactory index would be the development of their cultures, but there seems to be no available measure of the cultural development of peoples. An interesting experiment has been made under the auspices of the Russell Sage Foundation, which illuminates to some extent perhaps the comparative cultural development of the people of the different States of the American Union.[1] This was

[1] See Leonard F. Ayres, *An Index Number of State School Systems*, Russell Sage Foundation, 1920.

the compilation of an index number of State school systems. The index number was based on the percentage of school population attending school daily, the average number of days a year attended by each child of school age, the average number of days the schools were kept open, the ratio of high school attendance to total attendance, the ratio of boys to girls in the high school, and a variety of financial items relating to the average expenditures per child of school age, per pupil in attendance, and per teacher employed. The index number for the United States as a whole in 1918 was 51. California was rated 71, and South Carolina 29. The Western States as a group led all the rest with a rating of 64; the New England and North Atlantic States came second with 59; the North Central States came next with 57; while the South Central and South Atlantic States came last with 36 and 35 respectively. But such a classification reflects differences in wealth as well as in intelligence, and it would be impossible to discover to what extent these different factors influence the result. The true character of the states of the world to-day will be fully revealed only in their future history.

Character of the modern commonwealth

Fundamentally the nature of the state is determined by the character of the people who compose it. The modern commonwealth is a body of people who on the whole are healthier, more prosperous, more intelligent, more energetic, and more self-controlled, than the people of inferior kinds of states. They must possess all these qualities in order to be capable of forming a commonwealth. Above all, they must possess the necessary purposefulness to found their commonwealth on the firm basis of justice and liberty. To understand the nature of the modern commonwealth it is necessary to know the nature and relations of these underlying purposes and the ways and means of carrying them into effect. For if the commonwealth

derives its character from its people, its vitality springs from their purposes and will.

6

The complexity of modern politics

But, before considering further the nature and effect of the purpose of modern peoples to establish justice and secure the blessings of liberty, it is necessary to turn to certain other considerations which lie close to the foundations of the modern commonwealth. Modern politics reflect the conscious rational purposes of the peoples of states not merely, but also their emotional reactions, especially those springing out of their various religious, racial, and social experiences. The tremendous sympathies and antipathies, which these emotional reactions produce, create religious, racial, nationalistic, and social groupings of people, regardless of their political associations. These various non-political groups in their several ways share with the state the moral and material support of the people. They may even compete with it for their interest and loyalty. The relations between the state and the most important of these other human groups, the churches, the races and nations, and the social and economic classes, must be examined before the true foundations of the modern commonwealth can be properly understood.

Plan of remaining chapters of book

The next three chapters, therefore, will be devoted to a consideration of the relations between church and state, nation and state, and class and state, respectively. They will treat in turn of the influence of clericalism, of nationalism, and of socialism and communism in modern politics. The following five chapters will take up the five great purposes which constitute the true foundations of the modern commonwealth: to establish justice, to ensure domestic tranquillity, to provide for the common defense, to promote the general welfare, and to secure the blessings of liberty. Finally, a concluding chapter will be

reserved for the task of showing how the study of the nature of the modern commonwealth contributes to the solution of the problem of popular government.

NOTES ON BOOKS

1. A comprehensive discussion of the terminology of political science will be found in J. W. Garner's *Introduction to Political Science* (1910). This book contains also the most complete lists of references to the literature of political science that are available in any modern work in English. R. G. Gettell's *Introduction to Political Science* (2d ed., 1922) likewise contains useful lists of references. Edward Jenks's *The State and the Nation* (1919) furnishes an introduction to the theory of the state in the light of its historical origin and place in the development of human society. The sociological theory of the state, worked out by certain Austrian and German writers before the Great War, is illustrated by F. Oppenheimer's *The State, Its History and Development viewed Historically* (1908; English translation by Gitterman, 1913). See H. E. Barnes' comprehensive and judicious exposition and critique of the leading sociological systems in his *Sociology and Political Theory* (1923). The Marxian socialist version of the sociological theory of the state is clearly stated by W. Paul, *The State, Its Origin and Function* (n. d., published at Glasgow since 1916). A less materialistic interpretation of socialistic political theory may be found in J. R. MacDonald, *Socialism and Government* (1909). A selection of essays illustrating the ultraindividualistic and anarchistic attitudes toward the state will be found in a volume entitled, *Man or the State?* (compiled and edited by W. R. Browne, 1919).

2. Modern realistic political theory in English-speaking countries received its impetus from J. Bentham's *Fragment on Government* (1776; F. C. Montague's edition, 1891, is the best). A sympathetic account of this development in political theory is contained in W. L. Davidson's *Political Thought from Bentham to J. S. Mill* (Home University Library). The influence of European realism of another type is reflected in F. W. Maitland's *Introduction* to his translation of Gierke's *Political Theories of the Middle Age* (1913). A different phase of modern European realism is revealed in the writings of L. Duguit. See especially his *Law in the Modern State* (translated by Frida and Harold

Laski, 1919), and *The Law and the State,* 31 *Harvard Law Review,* 1-185 (December, 1917). The latter monograph, contrasting what Duguit calls the German theory of the absolute state with his own version of the theory that the authority of the state is itself limited by law, recalls Viscount Bryce's dictum that "theoretical controversies concerning sovereignty have mostly had their origin in current politics." See his *Studies in History and Jurisprudence,* No. 10, "The Nature of Sovereignty." For another, and in general a more satisfactory, statement of the recent reaction on the Continent of Europe against the theory of the "absolute state," see H. Krabbe's *The Modern Idea of the State* (translated by Sabine and Shepard, 1922). The translators' introduction is a distinct contribution to the value of the book for the American reader.

3. The juristic theory of the state, as developed in the English-speaking countries, is clearly expounded in J. C. Gray, *The Nature and Sources of the Law* (2d ed., 1921). See also T. E. Holland, *The Elements of Jurisprudence* (12th ed., 1916). The theory is stated more adequately from the standpoint of the political scientist in W. W. Willoughby's *The Nature of the State* (1896). See also R. T. Crane, *The State in Constitutional and International Law* (1907). The limitations of the juristic theory have been clearly exposed in a series of brilliant writings by H. J. Laski. See his *Essays on the Theory of Sovereignty* (1917), *Authority in the Modern State* (1918), and *Foundations of Sovereignty* (1921). For a sensible judgment on the current controversy over "monistic" and "pluralistic" theories of the state, see G. H. Sabine, "Pluralism: a Point of View," in the *American Political Science Review,* Vol. XVII, no. 1 (February, 1923). See also the note above on Krabbe's *The Modern Idea of the State.*

4. The idealistic theory of the state, as understood in modern times, begins with Rousseau. For its subsequent development by European writers, see C. E. Merriam, *A History of the Theory of Sovereignty since Rousseau* (1900), and F. W. Coker, *Organismic Theories of the State* (1910). See also W. A. Dunning, *A History of Political Theories from Rousseau to Spencer* (1920), which presents a rather unfavorable view of the idealistic theories, and E. Barker, *Political Thought from Spencer to Today* (Home University Library), which presents a more favorable view. The most satisfactory systematic statement of the idealistic political philosophy in English is still T. H. Green's *Lectures on the Prin-*

ciples of Political Obligation (Works, Vol. II, 1886). B. Bosanquet's *The Philosophical Theory of the State* (1899; 3d ed., 1920) is too greatly influenced by the extravagancies of the later German, especially the Hegelian, idealism. Its defects are clearly exposed in L. T. Hobhouse's *The Metaphysical Theory of the State* (1918). The best recent book on the theory of the state from the standpoint of a political idealist is J. Watson's *The State in Peace and War* (1919). But I find the most satisfactory exposition of the idealistic theory, not in the formal treatises of the philosophers, but written between the lines of the speeches and writings of statesmen, notably, in *The Federalist* and in the *Inaugural Addresses* of Abraham Lincoln and in certain of his *Messages* to the Congress of the United States.

CHAPTER III

CHURCH AND STATE

1

Principle of religious conformity

DURING many ages, including in some parts of the world the present, the first principle of politics has been that the people of a state should profess the same religion. This principle was accepted in the ancient world as axiomatic. It was applied in its crudest form in the pagan empires, where the head of the state was worshiped as the supreme being. Even at Rome, when the pagan emperors began to feel the need for some more august title than that of Caesar, the deification of the prince became a measure of practical politics. The Roman republic and the more enlightened Greek commonwealths shrank from the apotheosis of statesmen, but they clung tenaciously to the unity of church and state. Socrates, for his alleged blasphemous teachings, was put to death. His offense, to use modern terminology, was not merely heresy; it was also treason. There was indeed no distinction between heresy and treason, between church and state.

The pagan church-state

The pagan state was a church-state. It is not without reason that an ecclesiastic, that is, originally, one who belonged to the popular assembly in a Greek commonwealth, has come to mean, not a statesman, but a churchman. But Plato and Aristotle would not have understood the distinction between churchmen and statesmen. In their time the wise statesman had a care for the souls as well as for the bodies of his people. In the ancient Hebrew commonwealth there was a well-established distinction between priests and Levites, but there was none between

church and state. The commonwealth stood unchallenged as the highest form of community. That indeed is Aristotle's definition of a state, and Plato, bolder though not wiser than Aristotle, describes the ideal commonwealth in order to make clear his idea of a perfect man. This he could logically do, since the church-state was a complete and self-sufficing community. It constituted a true analogue for both the spiritual and the material nature of man. The classic idea of the state was one which greatly strengthened the hands of statesmen, because it merged religious faith and civic patriotism into one corporate sentiment of surpassing intensity and dignity and power. But it enthralled the souls of men in an ignoble bondage to tribal deities and parochial creeds. Then Christianity came into the world.

Christian distinction between spiritual and temporal affairs

The good Christian found the classic concept of the church-state unsatisfying and profane. Jesus was not interested in politics. "My kingdom," he said, "is not of this world." And he proved his faith by rejecting the leadership of the Jewish nationalists for the martyrdom of the cross. The duty of his followers was clear. "The kings of the Gentiles," he said, "exercise lordship over them . . . but ye shall not be so." The rules of conduct to be observed among Christians were simple. Their first commandment was, "Thou shalt love the Lord thy God with all thy heart and with all thy strength"; and the second, "Thou shalt love thy neighbor as thyself." Among a people observing such a law there should be little need for force and for the state as the instrument of force. The existence of the state, to be sure, was a fact which could not be overlooked. But it could be viewed with indifference. To "render unto Caesar the things that are Caesar's" was a counsel of prudence that was not intended to interfere with the higher duty to render unto God the things that are God's. No less significant was the potent

mandate: "Go ye into all the world and preach the gospel to every creature. He that believeth and is baptized shall be saved; but he that believeth not shall be damned." The propagation of the faith was a Christian duty, the performance of which was not to be impaired by any obligation towards Caesar.

The idea of the two kingdoms

Such was the origin of the idea of the two kingdoms, the kingdom of the flesh and the kingdom of the spirit, the kingdom of this world and the kingdom of the world to come. To the primitive Christian the pagan church-state was merely the kingdom of this world. The kingdom of the world to come was represented on earth by the Christian fellowship. In the eyes of these other-worldly people the kingdom of this world was of little account. They did not formally renounce their allegiance to the pagan church-state. But they recognized a distinction between the two forms of community and the highest was not the state. The supreme law for them was the gospel and the supreme community was the Christian Church, a voluntary association of people united together for the worship of God and the salvation of their souls. By refusing to acknowledge the authority of any other earthly power in spiritual affairs, they effectually accomplished the separation of church and state. The adjustment of the relations between the two communities became the first problem of Christian politics.

Attitude of pagan Roman Empire toward Christianity

The pagan Roman Empire did not at first take notice of this new political problem. Pontius Pilate was favorably impressed by Jesus' declaration that his kingdom was not of this world. Unfortunately he was not the man to put justice before political expediency. But the Master had also said: "Come unto me, all ye that labor and are heavy laden, and I will give you rest." And the poor and downtrodden came and believed and found rest. The Christian fellowship grew apace, and not without dis-

turbances and commotions. The wise Jewish lawyer, Gamaliel, might say: "Refrain from these men, and let them alone; for if this counsel or this work be of men, it will be overthrown: but if it is of God ye will not be able to overthrow them; lest haply ye be found even to be fighting against God." The world was not yet ready, however, for religious toleration. Pagan emperors believed that respect for their primacy in religion as well as in politics was necessary for the stability of the state. Christian bishops believed that the propagation of their faith was necessary for the salvation of the people. Their instructions read, "We must obey God rather than men."[1] The preaching of the gospel by the faithful inevitably clashed with the first principles of pagan politics, the supremacy of the head of the church-state and religious conformity on the part of loyal subjects. So, with the spread of Christianity throughout the Roman Empire, the problem of the relations between church and state became acute.

Effect of Constantine's recognition of Christianity as the state religion

The pagan empire, fearing subversion by the Christian propaganda, retaliated with its readiest weapon, physical force. But it could not hope to disperse the Christian Church, as it did the Jewish nation, by force of arms. It was compelled to resort to persecution. Christians were put to a test which showed how little power weapons of the flesh may have in a conflict with the forces of the spirit. Eventually the state capitulated to the church. But it capitulated on its own terms. Since it could not suppress Christianity, it made it the state religion. The great emperor Constantine personally presided at the general church council of Nicæa. The Arian heresy was officially condemned and orthodox Christianity was converted into a pillar of the state, like the pagan religions before it. Thus the unity of church and state was restored,

[1] Acts of the Apostles, v, 29.

at least in name. But the new form of church-state could never be so harmonious a community as the old, since the distinction between the two kingdoms remained.

The Holy Roman Empire

The establishment of the Holy Roman Empire by Constantine signified more, therefore, than the mere substitution of Christianity for paganism as the state religion. Good Christians might now be good citizens also, if they were not always; but their temporal rulers were reduced to the rank of mere statesmen, while their spiritual rulers remained a more or less independent hierarchy. The term churchman now began to mean to Christians more definitely one of the rulers, and no longer any faithful member, of the church. As the prestige of the temporal power declined during the years before the fall of the Empire in the West, the influence of the Christian hierarchy increased, and men became more and more disposed to acknowledge their authority, wherever it might be asserted. Thereafter the relations between the two arms of the community might often be readjusted, but the two arms themselves, as long as the Holy Roman Empire endured, could never be merged into one.

The Christian Commonwealth

The first interest of Christians, after as before the establishment of the Christian Commonwealth in the form of the Holy Roman Empire, was religion, not politics. This is manifested most clearly in St. Augustine's famous work, *De Civitate Dei*. In 410 A.D. the Goths sacked Rome, a catastrophe which unbelievers alleged would not have happened, if the pagan empire had not been subverted by the Christians. St. Augustine undertook to refute the charge. He cited the sack of republican Rome by the ancient Gauls as evidence that paganism brought no immunity against such disasters, and laboriously demonstrated, at least to the satisfaction of the faithful, that the humiliation of the temporal power had come through no fault of the spiritual. But the most effective portions

of his work were the noble passages in which he directed the attention of his readers away from the kingdom of this world to that of the world to come. Life on earth is but a preparation for the life everlasting. The sack of cities, even the fall of empires, like more personal calamities such as slavery, torture, and death, are but trials which good Christians will suffer patiently and with humility for their greater glory when they go to dwell in the house of the Lord. A more important lesson, he argued, may be found in the sufferings of the martyrs than in the sack of Rome.

Effect upon the Christian Commonwealth of the collapse of the Western Empire

And so it proved. The Western Empire collapsed before the barbarian invasions. The barbarians in turn were conquered by the Church. For many ages the strongest tie that bound together the heedless heirs of the Roman civilization was the Christian faith. When Charles the Great by dint of hard fighting built up a new empire from some of the scattered fragments of the old, he was able to strengthen his precarious authority over his reluctant subjects by accepting his crown from the hands of the bishop of Rome. Thus at one stroke he revived the dignity of the Holy Roman Empire and exalted the authority of the reputed primate of Western Christendom. But later emperors could not hold what his phenomenal energy had acquired. As the feudal system developed, the fluid tribal state of the early Middle Ages crystallized into a heap of personal loyalties without organic unity, and patriotic sentiment became a frail support for political authority. Despite the frantic efforts of a long line of military leaders and the dignified, if not very enlightened, appeals—one can hardly call them arguments—of noble minds like Dante's, the Holy Roman Emperors, so-called, saw their pristine power gradually slip from their enfeebled grasp. All the forces that weld together the masses of mankind, inertia, deference,

sympathy, fear, and reason, were mainly against them, and working in favor of their rivals in the struggle for power, the ecclesiastical hierarchy.[1] The medieval papacy rose triumphant amidst the ruins of barbaric monarchies and imperial pretensions.

Culmination of papal authority

Papal authority culminated in a claim for practical supremacy in temporal as well as in spiritual affairs. To be sure, the learned and ingenious expounder of the political theory of the Christian hierarchy in the West, St. Thomas Aquinas, the greatest of the medieval schoolmen, did not go so far as this. He clearly recognized the distinction between the two kingdoms, and was concerned only to show how the boundary between them should be defined. He begins with the proposition that the Christian Commonwealth, of which the Pope and the Emperor are the two heads, is founded upon the principle of the supremacy of law. Men, whether composing ecclesiastical hierarchies or imperial courts, are bound to observe the rules of conduct which it prescribes. But what is the law, whence is it derived, and by whom shall it be declared?

Political theory of St. Thomas Aquinas

Aquinas's answer to these fundamental questions contains the essence of the political theory of the papacy. Law consists of four sorts: eternal, divine, natural, and human. The eternal law, governing the very existence of a divinely ordained universe, lies hidden in the purposes of the Creator. It may be revealed to men at the discretion of the Creator, and the divine law, embracing so much of the eternal law as has been so revealed, is to be found in the Holy Scriptures. Moreover, since the Creator is the author of all nature, whatever is natural has presumably received his sanction, and the laws of nature, as far as men can discover and understand them, constitute

[1] See A. L. Smith, *Church and State in the Middle Ages* (Oxford, 1913), Lecture 3.

another body of evidence concerning the content of the eternal law. Last and of least authority are the man-made laws, which fallible mortals desire for their own convenience, because of their imperfect understanding of the eternal law in its various manifestations. Such, according to Aquinas, is the nature and origin of law.

The reign of law in the Christian Commonwealth

The question of practical consequence is, by whom shall it be declared? The interpretation of the Scriptures was conceded to be the business of the hierarchy, even by the most zealous advocate of the temporal power. When the meaning of the Scriptures was obscure, the hierarchy should declare the law by a proper act of ecclesiastical authority, such as a conciliar or papal decree. Neither church councils nor popes were charged with the discovery and promulgation of the law of nature. Such work would naturally fall to the men of learning. But in the Middle Ages the men of learning were ecclesiastics. It was inevitable that the law of nature should receive a canonical cast. There remained for the temporal heads of the Christian Commonwealth nothing but the declaration of the human law. In the present age of great legislative activity by the appropriate organs of the state, this branch of lawmaking seems tremendously important. In the Middle Ages it was not important. So the principle of the rule of law worked against the pretensions of the temporal authorities. It tended to reduce emperors and kings to the subordinate position of mere heads of the police department of the Christian Commonwealth.

Political supremacy of Medieval Papacy

The claim for papal supremacy was most strongly and at the same time most precisely put by the Pope Innocent III. It consisted of four propositions: (1) The Pope may rightfully exercise the powers of the Emperor, when the Empire is vacant. (2) The election of an Emperor is not valid unless ratified by the Pope. (3) The coronation of the Emperor by the Pope is indispensable for

the exercise of the imperial authority. (4) The investiture of the Emperor may be withdrawn by the Pope, as any fief may be withdrawn from a faithless vassal by his feudal superior.[1] In support of these vast temporal powers the Pope had at his command, to say nothing of the milder spiritual penalties, the terrible weapon of excommunication. So far had the authority of the Papacy expanded, since Charles the Great first sought its aid to strengthen the foundations of a dominion gained, but not easily held, by the sword alone. In Carlyle's expressive phrase, the tools to him that can handle them! The Holy See was far more capable than the Imperial Court of mustering the forces by means of which the turbulent but credulous men of the Middle Ages could be constrained to obedience. The spiritual triumphed over the temporal power because at that time it was more competent to make law and order prevail over violence and disorder.

Disruption of the Christian Commonwealth

But the Christian Commonwealth was not to become a theocracy. Unwise popes abused their power, weak popes let it waste away. Such centralization of authority presently proved unsuited to the changing conditions in Western Christendom. The papal dominion was assailed from without by feudal princes, who had successfully developed new sources of temporal power. It was undermined from within by the demand for a more representative form of church government. Finally, there came the Protestant Reformation. It is not necessary to dwell at length upon the successive stages through which the great unsettlement of opinion passed. It is enough to indicate that Christian opinion never again became settled with respect either to the form of religion or to the relations between church and state. The Christian Commonwealth was disrupted. On the one hand stood the apostolic

[1] Cf. David Jayne Hill, *The History of European Diplomacy*, Vol. I, p. 315.

Roman Catholic Church and the various reformed churches; on the other, the sundry territorial states which succeeded the feudal states of the later Middle Ages.

Political results of the Reformation

The ultimate effect of the Reformation upon the politics of Christian states was the general acceptance of true Christian principles. These are: (1) that pagans and heretics should be converted by peaceful suasion, not by force and violence; (2) that the conversion of unbelievers should be an ecclesiastical, not a political, enterprise; and (3) that the toleration of religious differences among the people of a state should be a cardinal maxim of statecraft. But the pagan principle that all the people of a state should hold the same religion was not rejected without a severe and prolonged struggle.

Intolerance of early Reformers

The leading Reformers, Luther and Calvin, like the Roman Catholics, were no advocates of toleration. Zealously heedful of the scriptural mandate to go into all the world and preach the gospel, they felt a divine mission to rescue as many souls as possible from the fate of unbelievers. The difficulty was to know what one must believe, and by whom and how one must be baptized, in order to be saved. In the opinion of the Reformers, as in that of the Roman Catholics, there was not only a best way to salvation, but there was no other way. To those who hold such opinions toleration seems a breach of faith. But religious intolerance, to be most effective, must be supported by temporal authority. In striking contrast, therefore, to the indifference toward the state displayed by the primitive Christians, the Protestant leaders became eager and energetic politicians. If they had not been politicians by conviction, the fact that the papal leaders had long been active and influential politicians and were quick to invoke the power of the Empire against the Reformers, would probably have driven the latter in self-defense to seek the aid of friendly

statesmen. Luther's policy at the Diet of Worms clearly foreshadowed the political strategy of the Reformation. The religious rivalry between the apostolic Roman Catholic Church and the various reformed churches was bound to become a struggle for political power.

Protestant political theory

Calvin and Luther, like Aquinas, believed in the supremacy of the law. But the Reformers differed from Aquinas with respect to the interpretation of the law. They repudiated the authority of papal and conciliar decrees, holding that every good Christian was entitled to read the Scriptures for himself and judge upon his own conscience what the Lord required of him. Hence Luther translated the Bible into German, the Calvinists into French, others into English; and thereby the way was unwittingly prepared for the nationalist movements of later ages. The early Reformers, however, were anxious not to subvert the foundations of the existing states. Calvin in his magistral *Institutes* solemnly inculcated the duty of obedience to the civil magistrates in temporal affairs, and presently established at Geneva an ecclesiastical and civil polity, in which much the same relations obtained between the ecclesiastical authorities and the civil magistrates as between the spiritual and temporal heads of the Christian Commonwealth according to the political theory of the medieval papacy. Luther was content to recognize temporal authority as he found it in the friendly German states and to accept such protection as was forthcoming on the statesmen's own terms. The good Christian might indeed, according to Luther and Calvin, judge for himself what the Lord required of him, but he was urged to be very slow, in cases where he felt oppressed by the temporal powers, to decide that the Lord had raised him up against the oppressor to be an avenger. In general, the common people were expected not to meddle with politics.

The divine right of kings

But how could the Reformers justify the authority of friendly statesmen in the face of the power to depose which was claimed for the Pope? Kings, so the papal argument ran, when excommunicated forfeit their crowns and kingdoms. By papal edict the faithful Catholic might thus be released from his oath of allegiance. Moreover, some Catholics believed that they were not bound to obey a Protestant king, even if not formally excommunicated by the spiritual authorities, since faith need not be kept with heretics. The obvious defense for Protestant rulers, whose authority was menaced by the spread of such opinions, was to assert that their authority came as immediately and directly from God as that of the Pope himself. Thus Dante's arguments in favor of the independence of the temporal power in the Holy Roman Empire were revived and adapted to the needs of the Protestant territorial states. The curious may find them meticulously set forth in the writings of the pedant king, James I of England. Thus the first political result of the Reformation was not the principle of religious toleration, but that of the divine right of kings.

The absolute sovereignty of hereditary monarchs

This principle may be summarized as follows:[1] (1) Monarchy, like the Papacy, is a divinely ordained institution. (2) Hereditary right to a throne is indefeasible. (3) Kings are accountable to God alone. (4) Nonresistance and passive obedience are enjoined by God. The first proposition meant that a pope had no more right to depose a king than a king had to depose a pope. The second, that subjects had no right to renounce allegiance to a king, who claimed his throne by right of inheritance, on account of differences of religion or alleged heresy. The third, that kings could do no wrong for which either subjects, other kings, or popes should hold them responsible. The fourth, that a dutiful subject, commanded by

[1] J. N. Figgis, *The Divine Right of Kings*, 2d edition, pp. 5, 6.

his king to perform an act to which he conscientiously objected, must obey the royal will and suffer uncomplainingly the penalties, if any, prescribed by ecclesiastical authorities for spiritual errors. In no case should he actively resist the authority of his sovereign lord and king. In short, the principle of the divine right of kings was an attempt to justify the absolute sovereignty of hereditary monarchs. For the reign of law, particularly the law as expounded by the papal authorities, was to be substituted the will of legitimate temporal rulers; and legitimacy, as Henry VIII demonstrated, was to be determined by a principle beyond ecclesiastical control.

The practice of limited toleration

An absolute sovereign, whether regarded as a temporal or a spiritual ruler, possesses by definition the right to determine the religion which shall be practiced by his state. Protestants, therefore, stood to gain by exalting the authority of the temporal rulers in all states whose rulers adhered or seemed likely to adhere to the reformed religion. Where the legitimate rulers adhered to the Roman Catholic religion, the interests of the Protestants lay in asserting the authority of the estates of the realm or of any civil magistrates who might be able to limit the authority of the sovereign. In desperate cases, when, as after the massacre of St. Bartholomew's Day, the fortunes of the Reformers seemed at a low ebb, they even considered the possibility of a Christian duty of tyrannicide. Catholics found themselves similarly perplexed, as their fortunes rose or fell in the uncertain struggle for political power. It was a period of confusion in theory and inconsistency in practice. After a century and more of religious strife and civil war, the treaties of Westphalia brought peace without victory. In Germany explicitly, and tacitly elsewhere in Western Christendom, the maxim, first set up at the Peace of Augsburg nearly a century earlier, was finally accepted: *Cuius regio, eius religio.* Temporal

sovereigns might encourage either the Catholic, the Lutheran, or the Calvinist religions within their domains. Other creeds were discountenanced. There was a limited toleration among princes, but none among their peoples.

The establishment of state churches

The principles of absolute sovereignty and religious intolerance produced that characteristic institution of modern times, the established church. In the medieval Christian Commonwealth there could be no question of an established church. The commonwealth was the church. The so-called conflicts between church and state were in reality jurisdictional controversies between spiritual and temporal authorities, between churchmen and statesmen. One effect of the Reformation was to emphasize the primitive Christian concept of the church as the whole body of believers, not merely an estate of the realm. But it brought into existence many such bodies, each conscious of its separate identity. Religious intolerance prompted political discrimination in each state in favor of some one of these churches and against the others. The absolutism of temporal sovereigns enabled them to establish the favored church as the state church. They gave it financial and, in case of need, military support, and in return secured control of the appointment of ecclesiastical officers. Such ecclesiastics became in effect officers of state. If the state church, as in England and the other Protestant countries, severed its connection with Rome, they might become state officials in form as well as in effect. Thus a Christian commonwealth would be created on a sectarian basis. Church and state would become one political entity under the sovereignty of the king.

Adoption of state religion for reasons of policy

Absolute sovereigns could use their power to favor either that religion which was more agreeable to their consciences or that most profitable to their interests. Probably the early Reformers did not mean to do more than assert that all coercive authority in the Christian

Commonwealth is vested in its temporal rulers. But by adding to this the prevailing notion that the ruler must support the one true religion and tolerate no other it was not many steps, as Figgis[1] has demonstrated, to the theory of Hobbes that the sovereign might support any religion he pleased from motives of policy and with no regard to the truth. Thus Henry of Navarre renounced the Huguenot faith in which he had been bred in order, for reasons of state, to recognize the religion which most of his subjects preferred. Paris, he frankly avowed, was worth a mass. Such Machiavellianism was the legitimate offspring of the marriage of statesmanship and churchmanship.

The beginnings of modern religious toleration

Nevertheless, it is to Machiavellian politics that the beginning of toleration in an age of religious zeal must be credited. A sagacious, though unscrupulous, statesman, Henry of Navarre tempered his favoritism towards the state religion by respecting the desire of the Protestants among his subjects to worship according to their own consciences. In 1598 the Edict of Nantes, by recognizing the right of the Huguenots to maintain their separate churches and the public exercise of their religion, set an illustrious example. But in general toleration for subject peoples was extorted from reluctant princes by bitter necessity. In England the founders of the Puritan Commonwealth were as bent on remoulding the established church-state according to the requirements of their own peculiar creed as their opponents had been before them. Despite the wisdom of a Cromwell, the first attempt to found a modern national commonwealth was shipwrecked upon the rock of religious intolerance. Charles II profited by the experience of Cavalier and Roundhead alike, and borrowed, grudgingly no doubt and without acknowledgments, from the statecraft of the great Protector. The menace of a revival of persecution under Charles's

[1] J. N. Figgis, *The Divine Right of Kings,* 2d edition, pp. 338-339.

fanatical and incompetent successor produced not only the "great and glorious revolution" of 1688, which Macaulay has so eloquently described, but also a general conviction that a moderate policy of toleration would be a lesser evil than chronic civil war. In the Calvinist and Lutheran states the same conviction was fast gaining ground.

Locke's theory of toleration

The foremost advocate in the seventeenth century of the principle of religious toleration was the political philosopher of the English Revolution, John Locke. In his famous *Letters Concerning Toleration* he declared that the saving of men's souls could not be the business of the civil magistrates. His arguments need not now detain us. It is enough to point out that they rested upon the assumption that neither civil magistrates nor ecclesiastical authorities are more likely to discover the way that leads to Heaven than "every private man's search and study discovers it unto himself." At last the full implications of Protestantism were recognized and their consequences acknowledged. From these premises Locke's conclusions followed logically enough. First, "All the power of civil government relates only to men's civil interests, is confined to the care of things of this world and hath nothing to do with the world to come." Secondly, "The church itself is a thing absolutely separate and distinct from the commonwealth." Thus at last the modern idea of religious toleration was formulated on the basis of the primitive Christian principle that there should be a complete separation of church and state. State and church alike, according to Locke, must be regarded as communities with limited objects. Each must be understood in the light of its characteristic purposes, and neither can be recognized as the exclusive possessor of absolute sovereign power.

The limits of toleration

In view of the existing conditions, however, Locke was forced to admit exceptions to the principle of toleration. Magistrates, he thought, ought not to tolerate: first, those

who claimed for themselves upon religious grounds any special authority over others in civil affairs; second, those who upon religious grounds claim any kind of authority over others not of the same religious faith; third, those who will not acknowledge the duty of tolerating others in matters of religion; fourth, those who belong to a church so constituted that its members owe allegiance to an alien prince; and fifth, atheists. In the latter part of the seventeenth century these exceptions were important, so important that neither England nor any other European state dared to carry the principle of toleration so far as to disestablish the state church and bring about the complete separation of church and state. Nor has the principle of full religious toleration yet been adopted in all Christian states, though much progress has been made since the close of the religious wars in the seventeenth century.

2

Relations between churches and states in modern times

The subsequent policies of European states with respect to the church and religion may be classified under four heads. In the first place, there were those states which clung to the medieval idea of the church-state and practiced unmitigated intolerance. In Spain and Portugal the persecution of heretics by the Inquisition was continued throughout the seventeenth and eighteenth centuries until interrupted by the incursions of Napoleon Bonaparte. The principle of religious toleration was not finally recognized in Spain until 1876; nor in Portugal until the establishment of the republic in 1910. In Portugal, for example, by the constitution in force, nominally at least, prior to the establishment of the republic, the apostolic Roman Catholic religion was the religion of the kingdom, but other religions were permitted to foreigners, who were allowed to hold private services in houses intended for that purpose, provided these houses did not have the

1. Union of church and state and practice of intolerance

external appearance of churches. But no such liberty was allowed to subjects. In the Italian Papal States the exercise of temporal sovereignty by the Pope preserved the confusion of heresy and treason and made every form of toleration impossible. There the principle of absolute sovereignty culminated in the dogma of papal infallibility, promulgated on the eve of the absorption of the States of the Church into the Kingdom of Italy in 1870. Since then there has been no Christian state, except orthodox Russia under the Czars, where the principles of absolute sovereignty and religious intolerance have so completely prevailed as before 1870 in the temporal dominions of the Supreme Pontiff.

2. Union of church and state and limited toleration

Another class of states comprises those which declared the apostolic Roman Catholic religion to be the state religion, but practiced a limited toleration of other religions. Within this class there have been great diversities in actual practice. In France, for example, after the revocation of the Edict of Nantes in 1685 the Huguenots were tolerated, but only upon very hard terms. Public worship by adherents of the reformed religion was prohibited, and even private worship was forbidden in the houses of noblemen, though not in those of other subjects. Huguenot ministers were required to accept Catholicism or leave the country. The Huguenots were forbidden to maintain private schools for the education of their children, who were to be baptized by Roman Catholic priests. Huguenots who nevertheless remained true to their religion were not to be molested, provided they made no attempt to leave the country. In that event the men were to be sent to the galleys and the women became liable to equally heavy penalties. Despite these severe conditions, few Huguenots abandoned their faith, though many fled the country. This harsh policy of limited toleration was maintained until the outbreak of the French Revolution a century later.

A. The Napoleonic Concordat

The revolutionists attacked the privileges of the church as well as those of the nobility, and for a short time atheism reigned supreme. But the worship of Reason failed to satisfy the instincts of the mass of Frenchmen, and a reaction set in, which demanded the restoration of Catholic Christianity to a privileged position. Eventually Napoleon re-established the apostolic Roman Catholic religion as the official state religion, thus renewing the relations between church and state which had been broken off during the Revolution. At the same time he adopted a more liberal policy of toleration. The Napoleonic Concordat of 1801 with the papacy assured to the church, (1) liberty for public worship, (2) the restoration of the church buildings to the bishops, and (3) suitable support for bishops and parish priests. It provided in favor of the state (1) for the nomination of bishops by the government and the approval of the nominations of parish priests; and (2) for state supervision of the conduct of public worship. The Holy See recognized the lawfulness of a government founded upon the principle of national sovereignty, and the Republic recognized the preference of the majority of Frenchmen for Catholicism and its right to a privileged position. But the adherents of other religions were free also to profess their faith and worship publicly in any manner they pleased not incompatible with the maintenance of good order. This policy of generous toleration was maintained until the final and complete separation of church and state in France in 1905.

B. Concordats in other Roman Catholic states

At present Spain is the only European country which still maintains a policy of strictly limited toleration. The apostolic Roman Catholic religion is the religion of the state, which is bound by the constitution to maintain this religion and its ministers.[1] No one, however, is to be molested on account of his religious opinions, or for the

[1] Constitution of 1876, Article 11.

exercise of his particular form of worship, provided he shows the proper respect for the established Christian morality, but public ceremonies and observances other than those of the state religion are not permitted. In America the most important country which maintains a policy of similarly restricted toleration is Chile. In Argentina, where, as in Chile, the apostolic Roman Catholic religion is the state religion, the relations between the Holy See and the Republic are regulated by a Concordat much as in France before 1905. In addition the president of the Republic must be a Catholic. But in none of these states is any aggressive effort now made to secure uniformity on the part of all citizens in the practice of religion. Intolerance has ceased to require persecution. The modern state does not put its trust in religion as the principal bond of union among citizens.

3. Established churches in Protestant states

In states which had established a Protestant church as the official state church the dependence of the church upon the state was until recently greater than in Catholic states. In Denmark, for example, under the constitution in force from 1849 to 1915, the Evangelical Lutheran Church was the national church and was supported by the state.[1] The king was required to be a member of that church, and its organization was regulated by law. Citizens, however, had the right to organize other religious societies in accordance with their beliefs, provided that their doctrines and practices did not violate good morals or disturb public order. No one was bound to contribute toward the support of any other form of worship than his own, but everyone who did not prove that he was a member of a religious denomination recognized by the state had to pay into the educational funds the personal taxes authorized by law for the use of the national church. The status of dissenting churches was determined by the law,

[1] Constitution of 1849, Articles 3, 5, 75, 76, 77, 78, 79.

but no one might be denied the equal enjoyment of civil and political rights on account of his religious beliefs, or refuse on religious grounds to perform any general civil duty. Conscientious objectors, for example, were not exempt from military service. The state insisted that religious scruples be subordinated to political obligations. Passive obedience, once the duty of all good Christians in all the Lutheran countries of northwestern Europe, long remained the rule in the Scandinavian countries.

A. Anti-clericalism in Prussia under Bismarck

The policy of asserting the supremacy of the state in ecclesiastical affairs was carried further in the German Empire than in any other Protestant state in modern times. In Prussia, before the Revolution of 1918, as in the other Lutheran states, religion, like education and the public health, was an ordinary affair of state. The established ecclesiastical system was operated as an administrative department of the government. In addition to the state church, however, other churches were freely tolerated. The state demanded no monopoly for its own religious services. Those who wished to worship in any other manner could organize their own churches, adopt their own creeds and rituals, and choose their own ecclesiastical officers; or they could adhere to the apostolic Roman Catholic Church, if they preferred. But the promulgation of the dogma of papal infallibility, following the Vatican Council of 1870, was regarded by Bismarck as a deliberate and dangerous challenge to the authority of the state.

One of his early measures, designed to consolidate the new German Empire, was to resist this assertion of ecclesiastical sovereignty in matters of religion. A paragraph of the imperial criminal code, adopted in 1871, forbade priests to deal with political matters in any ecclesiastical capacity. In the following year the Prussian government ordered the expulsion of the Jesuits. The controversy

thus precipitated between the Hohenzollern State and the Roman Catholic Church culminated in the enactment of the notorious May laws of 1873. These measures provided that no one should be appointed to any ecclesiastical office in the Kingdom of Prussia unless he were a German, educated in German schools, including three years in a German university, and had passed a state examination in history, philosophy, and literature. No appointment to an ecclesiastical benefice was to be valid without notice to the state officials, by whom confirmation of an appointment might be refused on the ground of danger to public order. All ecclesiastical seminaries were to be placed under the supervision of the state, and a special court was created for the trial of ecclesiastical offenses, to which was granted the power to suspend bishops and priests. Finally, a procedure was established for the guidance of those who might wish to leave the Church of Rome.

B. The Kulturkampf

Bismarck pursued his policy of exalting the authority of the state above that of the church with the utmost energy. Since the May laws conflicted with provisions of the Prussian Constitution of 1850, guaranteeing to religious corporations the right to manage their own affairs, he had the constitution amended. Since the officers of the Roman Catholic Church in Prussia resisted these measures with all their might, he deposed and imprisoned many of the archbishops and bishops and parish priests. Despite these drastic proceedings Catholics would not renounce their allegiance in matters of religion to their church, as represented by the regular hierarchy, whether approved by the royal authorities or not. Bismarck at length discovered that German Catholics were Catholics first in matters of religion, and could not be forced to obey the laws of the state in relation to affairs which they conscientiously believed to be properly ecclesiastical. Their preference for the authority of the church in such affairs was

too stubborn a fact to yield to any preconceived theory on the part of statesmen concerning the unlimited supremacy of the political power. Laws which are not obeyed are futile political instruments, and Bismarck was too sagacious a statesman to persist in a policy which only such laws could sustain. He confessed defeat, and the so-called *Kulturkampf* or war of cultures terminated in his profound humiliation. The modern world received a great object-lesson from which it might learn that church and state are indeed separate and distinct communities, if people only think so.

C. The Church of England

In Great Britain the solidarity of church and state is an ancient tradition without much present vitality. The king is still officially styled the Defender of the Faith and the king in parliament is still legally sovereign in ecclesiastical as in civil affairs. The Church of England is still the established church of the realm, but no attempt is made to exact contributions towards its support from members of other churches, and the latter are free to manage their own religious affairs without help or interference by the state. The state continues to be officially a church-state, but this condition has long been a fiction. Since the union of England and Scotland in 1707, the United Kingdom has been a single state, but there have been two separate state churches, the Church of England and the Church of Scotland. In Wales, indeed, the Church of England has recently been deprived of its special privileges and reduced to the same rank as the other non-official churches. The members of these other churches throughout the United Kingdom have long been emancipated from all the political disabilities imposed in the seventeenth century. Public office is now open to all citizens without regard to their religion. Since the Bradlaugh case even atheists may presumably sit in the House of Commons. Thus the restrictions upon toleration advocated by John Locke have

been notably relaxed. Only the presence of the Anglican bishops in the House of Lords reminds an indifferent generation of the intimate connection which once obtained between churchmen and statesmen, and of the importance formerly attached to religious considerations in the conduct of affairs of state. But, though religious unity is now held of little account by British statesmen, who have learned to look elsewhere for the foundations of that solidarity among their people which is essential to political stability, they have hitherto made no serious proposals for that complete separation of church and state, which, according to Locke, was the necessary consequence of any consistent policy of religious toleration, and which has actually been brought about in several of the British overseas dominions, notably in the Commonwealth of Australia.[1]

4. The separation of church and state

Modern states have adopted the policy of complete separation of church and state with even greater reluctance than that with which they accepted the principle of toleration.[2] The logic of events forced the British Parliament to disestablish the Church of England in Ireland a half century ago. An intelligent liberal, John Stuart Mill, even thought that the establishment of religious equality in that unhappy country would remove the cause of Irish discontent. Subsequent events have shown how much more important than religious feeling nationalistic sentiment and class consciousness have been in determining the relations between the English and Irish peoples in modern times. In Wales, though the mass of the people had long abandoned their attachment to the Church of England, that church was not disestablished until the World War. In France increasing friction between statesmen and churchmen finally led in 1905 to the termination of the

[1] Commonwealth of Australia Act of 1900, Article 116.

[2] See Bulletins of Massachusetts Constitutional Convention, 1917-1918, No. 18.

Concordat between the Republic and the Holy See and the complete separation of church and state.

Separation of church and state in America

In America church and state were first organized as separate entities in the colonies of Maryland and Rhode Island; but the policy of separation did not generally prevail until the Revolution. Jefferson had his authorship of the Virginia statute of religious freedom, which disestablished the Church of England in that State, inscribed on his tombstone as one of the three great acts of his life, along with the writing of the Declaration of Independence and the founding of the University of Virginia. The first amendment to the Constitution of the United States, adopted in 1791, forbade the Congress to make any law respecting an establishment of religion, or prohibiting the free exercise thereof, but the last of the established state churches, that of Massachusetts, was not deprived of its special privileges until 1833. The complete separation of church and state in that commonwealth was not accomplished until 1917, when a constitutional amendment was adopted prohibiting the grant of public money to any institution not under public control. Thus the policy of state aid to ecclesiastical activities was definitely renounced. Church and state are not yet completely separated in the United States. The reading of the Bible in the public schools is a common practice in many States, and there are several in which the State contributes to the support of ecclesiastical institutions. But the principle of toleration is universally and firmly established.

The policy of the United States has been widely followed among the states whose political development has been influenced by American experience. Among the Latin American states of this description the most notable in this connection is the Republic of Brazil. By the Federal constitution of 1891, the State governments as well as that of the Union are forbidden to establish, subsidize, or

The policy of Brazil

interfere with the exercise of religious worship or to impose any civil disability on account of religious belief. There is no religious qualification for any office, and no one may be compelled against his will to render any public service to which he conscientiously objects, but those who on the ground of conscience object to the performance of any civil duty forfeit their political rights. Church and state are absolutely separate and distinct, but a citizen may, if he chooses, put his ecclesiastical above his political obligations. Thus the principle of passive obedience is deliberately abandoned, and the sovereignty of the state in political affairs is expressly limited by the sovereignty of the church in affairs ecclesiastical.

Relations between the kingdom of Italy and the Papacy

Greater difficulties in adjusting the relations between state and church arose in Italy after the consolidation of the nationalist kingdom by the absorption of the States of the Church in 1870. In this instance the refusal of the Holy See to recognize an accomplished fact compelled the Italian monarchy to dictate a one-sided arrangement by the exertion of its political authority to the utmost. The original Italian Constitution of 1848 had provided that the apostolic Roman Catholic religion should be the state religion, although other cults, then existing, were to be tolerated in accordance with law. No religious qualifications had been prescribed for state officials, but the Roman Catholic archbishops and bishops were foremost among the classes of dignitaries from whom the king should appoint the senators of the realm. Evidently the original plan had been to govern the state in close association with the church. But the occupation of Rome by the royal forces in 1870 and the resulting breach between the Vatican and the Quirinal prevented any readjustment of the relations between church and state by mutual agreement. The church adopted the policy of ignoring the existence of the state, while avoiding an open conflict by

refraining from any conduct which would directly challenge the supremacy of the state within the field of secular politics. Its loyal members were advised to take no part in the government of the state and even to abstain from participation in the parliamentary elections. The state, on the other hand, defined its relation to the church in the Law of the Papal Guarantees, adopted in 1871.

The Law of the Papal Guarantees

This measure declared the person of the Supreme Pontiff to be sacred and inviolable. It provided that attempts upon his life should be punishable like those upon that of the king, and that insults upon his dignity should be punishable as libels. It assured him within the kingdom the sovereign honors usually accorded to him by Catholics, the exclusive use of the Vatican and other church property, and an annual income of generous proportions. It guaranteed the privileges and immunities of ecclesiastics and of diplomatic representatives of foreign powers accredited to the Holy See. It extended to the Supreme Pontiff the use of the postal and telegraph services and provided for the protection of papal couriers within the kingdom. It abandoned any right it might have claimed to supervise the management of ecclesiastical seminaries and left the education of the Catholic clergy entirely to the church. It abolished all special restrictions on the right of the clergy to assemble, and renounced on behalf of the state the right of appointment to the major benefices throughout the kingdom. Bishops were released from the obligation to swear fealty to the king, and the requirement that the publication of ecclesiastical proclamations and official acts be authorized by the government was rescinded. It further provided that there should be no right of appeal to civil tribunals from the decisions of the ecclesiastical authorities in matters of spiritual discipline, and on the other hand that such decisions should not be executed by the civil authorities. But the latter were

empowered to determine the legal effect of ecclesiastical decisions in so far as they might concern one's civil rights. The law provided expressly that ecclesiastics, committing acts contrary to the laws of the kingdom or inimical to public order, should be subject to the jurisdiction of the ordinary criminal courts, and that such acts should be treated as null and void. Thus the royal government sought to safeguard the special prerogatives of the Supreme Pontiff and assure the essential privileges of the Holy See without compromising the necessary independence of the state in its proper sphere.

Significance of Italian experience

The respectful consideration shown to the church by the Italian monarchy was no more acceptable to the papal authorities than the aggressive hostility of the Prussian monarchy. But the result of the conflict was very different. Prussia, though a Protestant state, was unable to sustain its domineering attitude. Italy, though more of its people professed the Catholic religion than any other, was able to adhere to its policy of tolerant non-intervention in ecclesiastical affairs, until during the Great War the Papacy abandoned its irreconcilable attitude and acquiesced in the separation of church and state. At the first elections after the restoration of peace faithful Catholics were urged to go to the polls and the Catholic party became one of the important factors in the conduct of political affairs. Thus the modern world received another great object lesson in the futility of attempts to establish either state churches or church-states which are not supported by the opinion of the body of people concerned. State and church alike find their true character in the purposes of their members, not in the pretensions to power of those who undertake to rule them. Sovereignty, ecclesiastical or political, means that degree of authority in church or in state, as the case may be, which people choose to recognize; nor can it mean more, despite

the theories of canon and civil jurists and the schemes of churchmen and statesmen.

The experience of Mexico

There remain a few states in which the separation of church and state has been accomplished not without such friction as to lead to serious discrimination against certain churches or ecclesiastics by the state. The most extreme case of this kind is Mexico. Both by the Constitution of 1857 and by that of 1917, religious orders were excluded from the country and strict limitations imposed upon the ownership of property by religious corporations and institutions. The activities of the Jesuits seem to have been viewed with alarm, and the acquisition of property by the Roman Catholic Church in excess of that actually needed for religious worship and other strictly ecclesiastical purposes was deemed incompatible with the desired development of peasant proprietorship of land. But the Mexican constitutions have generally enjoyed only a theoretic authority, and the policy of discrimination against certain ecclesiastics and certain ecclesiastical activities has led in practice to much arbitrary and oppressive action, not authorized by the constitution, against the Roman Catholic Church. Evidently there has been much opinion among the Mexican people decidedly hostile to the Roman Catholic Church as it has existed in that country. Such a situation cannot be permanently satisfactory either to good Christians or to good citizens.

The French theory of undivided state sovereignty

Other states in which the relations with the church have led to friction in modern times are France and Switzerland, but there the constitutions have enjoyed more than a merely theoretic authority. The Jesuits have been excluded from both these countries. In Switzerland no new religious orders may be admitted. In France none may be admitted except upon the terms prescribed in the Law of Associations of 1901. This law was designed to prevent the growth of any organized power within the

territory of the state beyond its legal control. The French theory of state sovereignty is that there can be no rights except those conferred by the state, no authority within the land other than that of the Republic. This is a theory of undivided sovereignty which is proper enough, so far as the relations between church and state are concerned, in a church-state like the Holy Roman Empire under Constantine or the Russian Empire under the Czars. But when church and state are separated in deference to the principle of complete toleration, the sovereignty of the church-state is divided between the two organizations. One, the state, retains political sovereignty; the other, the church, acquires the supreme power in purely spiritual affairs, unrestrained by civil laws. This results from the nature of a church. It, like the state, is a body of people organized in order the better to accomplish certain purposes and to that end endowed by its members with certain powers. The powers of the state extend to all fields of human action in which men may be coerced by physical force. But in the realm of conscience and religious belief the power of the sword must yield to that of spiritual forces. If men in fact acknowledge the sovereignty of the spiritual powers, its existence, as far as it may be acknowledged, is as real and effective as that of political sovereignty.

The true nature of political and ecclesiastical sovereignty

In the last analysis the authority of church and state alike is what men believe it to be. The boundary between them cannot be determined once for all upon any universal logical principle. It must be determined in each case by the conscience and will of the body of people directly concerned. Both forms of human association derive their vitality from the willingness of men to obey the authorities which they respect. The nature of the state, as of the church, is ultimately determined by the habitual conduct of its members. To accomplish the complete separation

of church and state requires the co-operation of both parties. If one party adopts the policy of separation and the other refuses to acquiesce, a conflict of jurisdiction is inevitably precipitated. The state may withdraw the special privileges of the church, in so far as they are conferred by law, and cancel all rights which depend for their efficacy upon the sanction of physical force. But the state cannot reach by any exercise of merely juristic sovereignty those moral rights which the church enjoys, not by grant from the state, but by the favor of its own members regardless of their obligations to the state. If men believe that their spiritual obligations to the church have a stronger claim upon them than their temporal obligations to the state, the authority of the state, so far as those men are concerned, will give way before that of the church in all matters which they regard as appropriate for ecclesiastical rather than political control. Sovereignty is not, as some theorists of the analytical jurisprudence would have it, supreme power unrestrained by law. Legal sovereignty may be so defined, but legal sovereignty is a fiction of the lawyers. Political sovereignty in any particular community is that degree of power which opinion tolerates in the rulers, and is very different in a church-state and in a state where, in accordance with the most modern principle of toleration, the church is regarded as an entirely separate form of human organization. In the modern secular commonwealth political sovereignty is accordingly limited by the nature of the ends which the commonwealth exists to serve.

The problem of the conscientious objector

Men continue to differ widely, however, in their attitude concerning those problems which grow out of conflicting obligations towards church and state. Shall conscientious objectors be constrained to perform their civic obligations, or shall the principle of passive obedience be finally abandoned by political authorities? Shall disorderly conduct,

or what seems to the members of many churches to be disorderly conduct, be tolerated when toleration is claimed on religious grounds? Or shall, for example, the kind of Sabbath-day observance generally preferred in a state be required of all, despite the preference of some for a different mode of observing the Sabbath, or for none at all? Shall Mormons, who in good faith according to the tenets of their church contracted plural marriages before such marriages were officially condemned, be admitted, when duly elected, to the Congress of the United States, or shall they be disqualified or ignominiously expelled? These and similar questions will continue to arise in modern states, and by the answer which statesmen give to them, it will be known what manner of state they govern. But no theory of the state can be adequate which fails to take into account the actual relations between church and state, that is, the actual adjustment by the people of their conflicting obligations as church members and as citizens.

The religious policy of secular commonwealths

The pagan principle that the people of a state should be forced to profess the same religion, or at least to renounce unauthorized religions, has been abandoned by all Christian states. Persecution is no longer a public enterprise in any Christian country. But, while no systematic attempt is now made by any Christian state to compel men by physical force or other political agencies to accept any particular faith, there is no uniformity with respect to the practice of toleration, and the relations that should obtain between church and state remain a subject of controversy and contention. Certain states continue to favor certain churches, and make efforts to dissuade men from forsaking the favored church in order to enter another or from abandoning religion altogether. Even those states which have acknowledged the separation of church and state, which have adopted the policy of religious freedom, and which have recognized the equality of

all churches before the law, are not always wholly indifferent in matters of religion. In the United States, for example, the observance of the Sabbath is regulated by law, and the political authorities are in the habit of giving expression to the religious character of the people in many ways. The Congress and the State legislatures open their sittings with prayer; the president and the State governors annually appoint a day of public thanksgiving; the courts of justice administer oaths to all witnesses except those with conscientious objections to swearing; and public officers swear faithfully to perform the duties of their offices, though they may, if they wish, make an affirmation instead. Ours is a secular commonwealth in principle, and a religious commonwealth in practice. But we refuse to commit our commonwealth to any particular religion, believing it unwise to attempt to determine the true religion by any political process. This is clearly the religious policy which tends to prevail in modern Christian states.

3

The policy of the Christian churches toward the secular commonwealth

But, while the principal Christian states have been gradually becoming more favorable to religious freedom and the separation of church and state, the attitude of the Christian churches is not so clear. Wherever Protestant churches have been established by law, churchmen have been reluctant to give up their special privileges. The Church of England resisted disestablishment in Ireland and Wales, and presumably opposes disestablishment in England. In Germany the Lutheran churches have clung to their privileges as long as possible, and seem to have retained some of them even through the Revolution. In the United States, however, the variety of religious opinion made the position of the established churches untenable at a comparatively early period in the history of the Republic, and there is now general acquiescence on

the part of Protestants in the separation of church and state. But the Roman Catholic Church has adhered more tenaciously to the traditional clerical attitude toward the state. This church has a longer tradition behind it than the others; it comes into contact with a greater number and variety of states; and no new policy would be suited to all its circumstances or acceptable to all its members. It is not surprising that Roman Catholics continue to cherish the medieval ideal of the two kingdoms, constituting one Christian commonwealth.

The policy of the Roman Catholic Church

The official policy of the Roman Catholic Church with respect to the relations between church and state has been set forth in a long line of church papers and documents. The latest and most authoritative is the Encyclical Letter "Immortale Dei," issued by Pope Leo XIII, on November 1, 1885. This is in substance a short treatise on the Christian constitution of states, and summarizes the political theory of the modern papacy. "The Catholic Church," it begins by saying, "has for her immediate and natural purpose saving souls and securing our happiness in Heaven." The chief end of her existence, therefore, is not to ensure the happiness of man's earthly life. That is the business of the state. But, the Encyclical proceeds, it is not difficult to determine what would be the form and character of the state, if it were governed according to the principles of Christian philosophy. "All public power must proceed from God, for God alone is the true and supreme Lord of the world. . . . The right to rule, however, is not necessarily bound up with any special mode of government. It may take this or that form, provided only that it be of a nature to insure the general welfare. But whatever be the nature of the government, rulers must ever bear in mind that God is the paramount ruler of the world, and must set Him before themselves as their exemplar and law in the administration of the State."

These are general principles which all good Christians will endorse and from them the Encyclical draws conclusions some of which at least should be equally acceptable. For example, "Government should," to quote further, "be administered for the well-being of the citizens because they who govern others possess authority solely for the welfare of the State." Furthermore, "the civil power must not be subservient to the advantage of any one individual or of some few persons, inasmuch as it was established for the common good of all."

The doctrine of the Christian commonwealth

The Roman Catholic doctrine of the Christian commonwealth sets up a splendid ideal of the form and character of the state. It would furnish an admirable guide for the practice of statesmen, if all men were Christians and all Christians were Roman Catholics. Adherents to Catholicism, of course, are bound to believe that all men should be Christians and Catholics. Therefore this ideal of the commonwealth is a proper one for Roman Catholic churchmen to hold. But observation shows that in fact many men are not Catholics nor even Christians. They may be Jews or other types of monotheists, they may be agnostics, they may even be atheists. The modern commonwealth, however, exists to establish justice, to secure the blessings of liberty, and to accomplish the other purposes of bodies politic for the benefit of all its members. It cannot wait for all the people to come to any one opinion in matters of religion. It must deal with them as it finds them. To hold that such a state is no commonwealth because not a Christian commonwealth is to hold that others than approved Christians have no rights which such Christians are bound to respect. The Roman Catholic Church does not hold such an extreme view as that. It does hold, however, according to the Encyclical Letter on the Christian Constitution of States, "that it is not lawful for the state, any more than for the individual,

either to disregard all religious duties or to hold in equal favor different kinds of religion." By lawful, of course, is meant that which is sanctioned by the eternal law. Such a view of the religious vocation of the state is logically consistent with the Roman Catholic ideal of a Christian commonwealth, but it is ill-suited to modern states in which unorthodox religious opinions are widely held among the people.

Political theory of the Roman Catholic Church in the United States

The unsuitability of the medieval ideal of the Christian commonwealth to the conditions that actually prevail in many modern states is frankly recognized by authoritative Roman Catholic writers. Recently the papal Encyclical on the Christian Constitution of States, together with a very able commentary by a loyal Roman Catholic and patriotic American, Dr. John A. Ryan, has been published with the official approval of the Roman Catholic hierarchy.[1] Dr. Ryan explains the political theory of the Roman Catholic Church and defends it against the charge that it is a menace to the American Commonwealth. He gives particular attention to the Roman Catholic principle of union between church and state. He asserts that, in accordance with this principle, the state should officially recognize the Roman Catholic religion as the religion of the commonwealth and should at least protect true believers against the propagation of false doctrines. He is aware that champions of religious liberty will denounce these propositions as the essence of intolerance. "They are intolerant," he concedes, "but not therefore unreasonable. Error has not the same rights as truth. . . . Since the profession and practice of error are contrary to human welfare, how can error have rights? How can the voluntary toleration of error be justified? . . . The men who defend the principle of toleration for all varieties of

[1] See John A. Ryan and Moorhouse F. X. Millar, *The State and the Church.*

religious opinion, assume either that all religions are equally true or that the true cannot be distinguished from the false. On no other ground is it logically possible to accept the theory of indiscriminate and universal toleration."

Dr. Ryan overlooks another ground for toleration of various religions by the state, namely, that the people may not wish to entrust the task of distinguishing the true from the false to the political authorities. They may not even venture to undertake the task themselves as an organized political body, preferring to leave it to each member of the state to decide for himself as an individual. The individual, of course, if a Roman Catholic, may consult his priest or his bishop, or the pope. If a non-Catholic, he may consult his Bible, or his minister, or his church, or his own conscience. In states where the people are predominantly Roman Catholics, the effect would be to entrust the task of making the distinction to the ecclesiastical authorities, and the effort to keep religion out of politics would probably fail. In other states it might succeed. In practice, therefore, the propositions which Roman Catholics derive from the principle of union between church and state can have full application only to the completely Catholic state.

Distinction between Catholic and non-Catholic states

Dr. Ryan recognizes this fact, though he overlooks the reason for it. He proceeds to quote with approval the opinion of Father Pohle that "there is good reason to doubt if there still exists a purely Catholic state in the world," and that "when several religions have firmly established themselves and taken root in the same territory, nothing else remains for the state than either to exercise tolerance towards them all, or, as conditions exist to-day, to make complete religious liberty for individuals and religious bodies a principle of government." Dr. Ryan recognizes that these are the conditions which exist

in the United States and which may be expected to continue to exist for an indefinite period in the future. They justify the policy which has come to prevail. "Therefore," Dr. Ryan concludes, "we shall continue to profess the true principles of the relations between church and state, confident that the great majority of our fellow citizens will be sufficiently honorable to respect our devotion to truth, and sufficiently realistic to see that the danger of religious intolerance toward non-Catholics in the United States is so improbable and so far in the future that it should not occupy their time and attention."[1] In short, the present policy of the Papacy, as expounded by Dr. Ryan, seems to be to cherish its ideal, but to accommodate itself in practice to the ideas actually prevailing in the states with which it comes in contact, at least where those states are tolerant of Roman Catholicism.

Political policy of the Roman Catholic Church in Europe

The political policy of the Roman Catholic Church in many European countries down to the World War did not reflect the same acquiescence in the tolerance of dissent and the separation of church and state as in the United States. Since the War there have been signs of a change. In Italy the long-cherished policy of abstention on the part of Roman Catholics from national politics was abandoned, and at the elections of 1919 the Catholic party secured a strong representation in the Parliament. The separation of church and state, brought about by the royal government in 1871, seems to be accepted as a *fait accompli*. In France, where the conditions of the separation, adopted by the government of the Republic in 1905, had never been acceptable to the Church, a *rapprochement* was encouraged by the events of the War and projected by an agreement, proposed in 1922, giving to ecclesiastical congregations a larger measure of control over church

[1] *The State and the Church*, p. 39.

property than formerly and in other ways modifying in favor of the church the relations between church and state. But the principle of separation is maintained. In Germany, where the Revolution broke down the intimate connection which had formerly obtained between church and state, the effect was on the whole favorable to the Roman Catholic Church, since the Lutheran Church lost many of the special privileges which it had formerly enjoyed, especially in Prussia, and the possibility of another *Kulturkampf,* like that which Bismarck had waged, was destroyed. The Catholic or Center party, however, has maintained its organization intact, though with diminished strength. Its leaders have taken a conspicuous part in the government of the Republic, showing far greater interest in national and social problems than in those relating particularly to matters of religion. A growing disposition to keep religion out of politics is clearly indicated by the recent events in these countries.

The religious settlement in Poland

The present political policy of the Roman Catholic Church is probably most clearly indicated by the religious settlement in the new Republic of Poland. The majority of the people of Poland are Roman Catholics, and under a democratic form of government, such as has been established, can arrange the relations between church and state as they please, subject to the general principles laid down by the Allied Powers in the Treaty of Versailles and in the special treaty between the Allies and the infant republic. The Allied Powers made the guarantee of freedom of conscience and religion and the protection of the rights of members of all churches equally without regard to differences in religion a condition of Polish independence. In the Constitution, adopted March 17, 1921, therefore, it is provided that no citizen may suffer any limitation of the rights enjoyed by other citizens on account of his religion, and that all inhabitants have the right of freely professing

their religion in public as well as in private.[1] Since, however, the Roman Catholic religion is the religion of the preponderant majority of the people, the Constitution provides that it shall occupy in the state the chief position among the enfranchised religions and govern itself under its own laws, and that the relations between the Roman Catholic Church and the Republic shall be determined on the basis of an agreement with the Holy See, subject to ratification by the Parliament.[2] The churches of the religious minorities may also govern themselves under their own laws, which the state may not refuse to recognize unless they contain rules contrary to the laws of the Republic.[3] Instruction in religion is compulsory for all pupils under sixteen years of age in educational institutions maintained wholly or in part by the state or by other duly authorized organizations. The direction of religious instruction is in the hands of the respective bodies, reserving to the public educational authorities the right of supreme supervision.[4] Thus the state will support religious education, and may also support public worship according to the rites of that religion which occupies the chief position in the state. If it does so, it is nevertheless under no obligation to give the same support to the minority churches and religions, though it may not interfere with them. The situation which may prevail is, therefore, not unlike that which actually exists in England, with the Church of Rome in the position occupied there by the Church of England. The Constitution provides further that the recognition of a new religion may not be refused to religious communities whose organization and teachings are not contrary to public order and morality.[5]

[1] Article 111.
[2] Article 114.
[3] Article 115.
[4] Article 120.
[5] Article 116.

Thus the Republic reserves the power to deal with a new and objectionable religious community as drastically as the United States dealt with the Church of the Latter-Day Saints. But there can be no more public control over religious propaganda than is compatible with an express guarantee of freedom of speech and of the press. Apparently, the political policy of the Roman Catholic Church in Europe has been modified since the time when European Republicans were so stirred by Gambetta's dramatic warning, *le cléricalisme, voilà l'ennemi!*

Decline of religion as a political force in Christian states

In Christian countries religious sentiment is now a much less important factor in politics than it was before and during the Protestant Reformation. Its strength was dissipated in fratricidal strife, which often proved futile and always calamitous. But the profound impression, which centuries of religious experience have left in the minds of men, remains one of the most important facts with which modern statesmen have to deal. It inspires with a special zeal energetic and influential parties in many modern states, and affects partisan activities in all. It was once said: "At the bottom of our politics we always find theology." This can no longer be said with equal truth. But religion still remains one of the most powerful political forces in Christendom.

Importance of religion in non-Christian states

It is in the non-Christian states, however, that religious sentiment now produces its most potent effects. In every state in which Mohammedanism counts its followers it is a factor, in some a dominant factor, in politics. The British, seeking during the World War for some weapon to sustain their influence over the various Moslem peoples subject to their dominion, gladly recognized the independence of the Kingdom of the Hedjaz in order that the sacred places of Islam might be under the jurisdiction of a friendly monarch. In organizing the administration of Palestine under the mandate of the League of Nations

they were careful to safeguard Moslem as well as Jewish and Christian interests. In Mesopotamia they supported the Arabs against the Turks, but in setting up the State of Iraq they scrupulously refrained from disturbing the *status quo* in religion. In the dominions which remain under the control of the Turk secular patriotism has recently proved strong enough to bring about the overthrow of a weak and incompetent Sultan, but the triumphant Nationalists have disturbed as little as possible the religious authority of the successors of the Prophet. They have adopted the republican form of government for their reorganized state, but they have respected the ecclesiastical institutions of the Khalifate. In India and China the Mohammedans are recognized as a special element in the population, and the builders of states lay their plans accordingly. The Hindu Nationalists make special concessions to the Mohammedans, in order to secure their co-operation in the campaign for Indian independence. In China even the flag of the Republic contains a separate stripe bearing the special color of the Mohammedan Chinese. There are no other religions whose influence so profoundly affects the foundations of modern states as Mohammedanism, though in Japan the reverence for the Emperor as the Son of Heaven contributes greatly to the stability of that Empire.

No definitive solution of the conflicting political and religious interests of mankind

In general the recognition of the distinction between church and state has gone so far as to make some form of toleration an indispensable part of the policy of modern states. It cannot be said, however, that any definitive solution has been found for the conflicting political and religious interests of mankind. Their adjustment remains one of the most difficult problems which churchmen and statesmen have to face. It is evident, nevertheless, that religious sentiment, as a factor in the making of states, must yield its former predominance to more modern bonds of

union. Among these the sentiment of nationality is entitled to prior consideration.

NOTES ON BOOKS

1. The relations between church and state in ancient and medieval times are briefly discussed in Sir F. Pollock's *Introduction to the History of the Science of Politics* (revised ed., 1911). The contentions and arguments of various writers are explained in W. A. Dunning's *History of Political Theories: Ancient and Medieval* (1902). But for an understanding of the nature of church and state one must go to the standard political histories and to such books as A. E. Zimmern's *The Greek Commonwealth* (2d ed., 1915), and Bryce's *Holy Roman Empire* (revised ed., 1886). See also A. L. Smith, *Church and State in the Middle Ages* (1913). Well chosen selections, illustrating the thought of the more important writers on this and other topics in political theory, may be found in F. W. Coker's *Readings in Political Philosophy* (1914).

2. W. A. Dunning's *History of Political Theories: From Luther to Montesquieu* (1905) brings his account of the literature of political and ecclesiastical controversy down to the dawn of the age of toleration. See also G. P. Gooch's *Political Thought from Bacon to Halifax* and H. J. Laski's *Political Thought from Locke to Bentham* (both in the Home University Library series) for illuminating discussions of important phases in the growth of the idea of toleration. The constitutional status of the churches in modern states may best be investigated by beginning with the data contained in W. F. Dodd's *Modern Constitutions* (2 vols., 1909) and in McBain and Rogers's *The New Constitutions of Europe* (1922).

3. The case for ecclesiastical sovereignty is presented in J. N. Figgis's *Churches in the Modern State* (2d ed., 1920). See also his instructive earlier works, *The Divine Right of Kings* (2d ed., 1914), and *Studies of Political Thought from Gerson to Grotius* (1907). The present political theory of the Apostolic Roman Catholic Church is authoritatively expounded in J. A. Ryan and M. F. X. Millar's *The State and the Church* (1922). For an introduction to the political theories of Mohammedanism and of other oriental religions, see G. F. Moore's *History of Religions* (2 vols., 1913-19).

CHAPTER IV

NATIONALISM

1

Principle of national solidarity

A SECOND great principle of politics, which in modern times has been even more important than the first, has been stated as follows: "It is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities."[1] Any profitable discussion of this proposition, as of most propositions in politics, must begin with the definition of terms. Indeed few words in political terminology have been used more vaguely, and through their indefiniteness have brought more confusion into the modern world, than nation and its derivatives, nationality and nationalism.

What is a nation?

Nation and state

The international lawyer ordinarily uses the term nation as equivalent to state. It is so used in the Covenant of the League of Nations, though the nations which, in addition to the original members of the League, are eligible for membership are more precisely defined as "fully self-governing states, dominions, or colonies." Lawyers and diplomats alike use the term national as a convenient substitute for the longer and awkward expression, citizen or subject of a state. In common parlance also nation is freely used as a synonym for state, or in the United States to designate the Union of States as a political entity distinct from the States in the Union. The popular American use of the term has, indeed, the sanction of authoritative usage in at least one important

[1] J. S. Mill, *Considerations on Representative Government,* Chapter XVI.

modern state. The official designation for the Argentine Republic, deliberately employed in the Constitution of that state, is the Argentine Nation. The preamble explicitly affirms that the Constitution was ordained by the representatives of the people of the Argentine Nation. But this use of the term is open to the objection that it wastes a word which is useful and may be conveniently used for designating a different concept from that of the state.

Nation and race

The etymology of the word, nation, indicates an association originally with the idea of birth or race. Doubtless when the word was first used, the members of a nation were supposed to be the descendants of a common ancestor, as the Jews were reported to have sprung from Abraham. But modern anthropologists and ethnologists have not succeeded in classifying mankind upon the evidences of relationship by blood, so as to enable the political scientist to identify nations with particular races. The division of mankind into dolichocephalic and brachycephalic throws no light on contemporary problems of nationality. Long heads and round heads may be found in every country. Huxley's classification of mankind into Xanthochroic or fair white, Melanochroic or dark white, Mongoloid or yellow and red, Negroid or black, and Australoid takes into account certain superficial differences among men, color of skin, hair, and eyes, texture of hair, shape of skull, and character of features. The republic of Liberia is actually organized in accordance with this classification of races. None but negroes may take part in its government. But such a classification does not simplify the problem of home rule in Ireland or self-determination in India. In a world where mulattoes, mestizos, and zambos seem to be increasing and capable of perpetuating themselves, the political scientist needs a better definition of race than that which depends mainly on color.

Untenability of ethnological theories of nationality

The subdivision of a portion of the whites into the Nordic, Alpine, and Mediterranean races has proved serviceable to propagandists seeking catchwords to popularize their proposals, but it is not until such divisions of subdivisions are reached as Teutonic, Celtic, Slavic, etc., that the consciousness of racial affinity becomes a considerable factor in politics. Yet every well-informed ethnologist knows how little scientific value such concepts have in explaining the nationalist movements of nineteenth century politics. The Dutch and the Flemish have not cared to participate in the Pan-German movement, though sufficiently Teutonic. The Czechs, the Slovaks, the Serbs, the Poles, and the various divisions of Russians, to say nothing of minor groups such as the Ruthenians, the Croats, and the Slovenes, are all Slavic, but pan-Slavism has left most of them comparatively cold. The Swedes, the Norwegians, and the Danes have drifted apart, though all Scandinavians and once politically united. Anyone can observe the mixture of breeds that is taking place in America. The same process has occurred everywhere over and over again. Should an Englishman be classed (1) as a Celt together with Irishmen, both Sinn Feiners and Ulsterites, because the original inhabitants of England, the ancient Britons, were Celts, or (2) as a Teuton together with Saxons, Prussians, and other Germans, on account of the invasions of the Angles and Saxons, or (3) merely as British together with Scotchmen and Welshmen, or (4) perhaps as Scandinavian on account of Danish incursions and the Norman Conquest?

The definition of a nation by Burgess

It is evident that no definition of a nation, which has its essence in ties of race, can serve the needs of the political scientist. The definition by Burgess,[1] for example, "A population of an ethnic unity, inhabiting a territory of a geographic unity, is a nation," must be summarily

[1] *Political Science and Comparative Constitutional Law,* Vol. I, p. 1.

rejected, at least so much of it as relates to ethnic unity. It was an unscientific product of an age which thought it had discovered some mysterious political magic in men of Anglo-Saxon or Teutonic blood. But when, to borrow Tagore's vivid phrase,[1] "the West in the voice of her thundering cannon had said at the door of Japan, Let there be a nation . . . and there was a nation," it became impossible longer to regard political aptitude as a racial heritage. If some nations have been more successful than others in modern international contests, the explanation must be sought elsewhere than in the fancied superiority of any supposititious "ethnic unity."

Strategic frontiers

The latter part of Burgess's definition, emphasizing the geographical aspects of nationality, is no more tenable than the former. What are the natural boundaries of a "geographical unity"? One answer is, that natural boundaries mean strategic frontiers. For some Englishmen the menace of an Irish base for hostile aggression against Great Britain was a sufficient reply to the plea for the independence of Ireland. But such Englishmen do not deny the existence of a separate Irish nationality. In the opinion of some Frenchmen the Rhine frontier was the only adequate security against a revival of German power. But such Frenchmen do not assert that the Germans living west of the Rhine are French. In the opinion of some Italians, the line of the Alps and the eastern shore of the Adriatic were indispensable for the safety of their state. But there is no relation between such frontiers and the boundaries of any "ethnic unity" recognizable either by Italians, Germans, Jugo-Slavs, or Albanians. In the opinion of some Americans, the possession of the Hawaiian Islands was necessary for the protection of the Pacific Coast. Were the native inhabitants of those

[1] Rabindranath Tagore, "Nationalism in the West," *The Atlantic Monthly*, March, 1917.

islands a part of the American nation? Strategic frontiers evidently do not coincide with the boundaries of nations. They cannot define what is meant by a geographical unity.

Economic self-sufficiency

Natural boundaries have also been defined as those necessary and proper for securing the economic independence and self-sufficiency of a body of people. This seems to have been the thought of one of the earliest and greatest of the German nationalists, Fichte. In his earlier political writings he expressed the opinion that a nation should possess such boundaries as would ensure the supply from domestic sources of all the necessaries and customary comforts of life.[1] International trade should be a superfluous luxury. However practical such a policy may have been under the simpler conditions of ruder times, it need not be seriously considered to-day. The development of modern industry and commerce has gone too far along the road of the international division of labor and exchange of products. The automotive industries, for example, could not exist without rubber, petroleum, and steel, which no single country produces in the requisite proportions. Fichte himself in his later political writings abandoned the idea that the boundaries of nations should coincide with those of self-sufficient economic areas.[2] There is no good reason for trying to revive it. The effort to identify a nation with either an ethnical unity or a geographical unity, to say nothing of trying to identify it with both together, has failed to explain the nationalist forces in modern politics. Such objective tests of nationality do not fit the facts.

Subjective theory of nationality

The transition from an objective to a subjective theory of nationality can be illustrated by two passages from the first inaugural address of America's greatest nationalist,

[1] See especially his *"Der Geschlossene Handelsstaat."*
[2] See his *Reden an die Deutsche Nation,* 1813-1814.

Abraham Lincoln. "Physically speaking," he said, introducing a plea to the whole body of people, both North and South, for loyalty to the Union, "we cannot separate. We cannot remove our respective sections from each other nor build an impassable wall between them." That was a recognition of an objective aspect of nationality, territorial propinquity and the resulting common economic interests. Presently he returned to the topic: "I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature." Thus he indicated the true essence of nationality, "bonds of affection"—not merely those of blood or territorial propinquity, or rational self-interest—and "the mystic chords of memory."

Definition of nationality

Nationality, regarded as a force in modern politics, is a corporate sentiment, a kind of fellow feeling or mutual sympathy, relating to a definite home-country, and binding together the members of a human group, irrespective of differences in religion, economic interests, or social position, more intimately than any other similar sentiment. It springs, as Lincoln eloquently suggested, from a common heritage of memories, whether of great achievements and glory or of disaster and suffering. The undistinguished individual in a group, where the sentiment of nationality is strong, merges his puny personal identity into that of the whole magnificent group, and becomes capable of exalted emotions and glorious deeds. He can satisfy his private craving for personal immortality in the infinite life of the group, and the sentiment of nationality thus acquires the force of religion. It may be fostered in a body of people

by the knowledge of or belief in a common ancestry, but this is not important in modern times, since the basis of the solidarity of the national group has been changed from blood kinship, real or assumed, to a definite territorial habitat. It is more effectively fostered by the diffusion of education and the abatement of illiteracy. The resulting growth of a knowledge of the literature of the country has been quickly followed among the peoples of modern Europe by a corresponding growth of national sentiment. Because of the importance of a knowledge of the language and culture of a country in this connection, it may even be said that the translation of the Bible into the vernacular by the German, French, and English Protestant leaders at the beginning of the Reformation laid the foundation for the modern sentiment of nationality. Indeed, so great has been the influence of language and literary culture upon the growth of national sentiment in modern times, that language has become the most generally accepted objective test of nationality.

Nationality and patriotism

But nationality itself is purely subjective or psychical in nature. Like patriotism, to which it is akin, it is a sentiment of peculiar intensity and dignity. Unlike patriotism, it has no necessary relation to any particular state, but, as has been said, to a home-country. Its existence cannot be discovered, nor its strength estimated, by ethnological researches or geographical surveys, but only by observing the actions of men.

Final definition of a nation

A nation, therefore, may be defined as a body of people united by a common sentiment of nationality. Its most fundamental characteristic is cultural unity. A recent writer on the subject is substantially correct when he says that "a nation is a culturally homogeneous social group, which is at once conscious and tenacious of its unity of psychic life and expression. . . . If such a group is at the same time politically organized within a given territory

it may then be designated a national state."[1] But a nation is not necessarily a state any more than a state is necessarily a nation. This distinction between state and nation is convenient for the political scientist, but it is frequently disregarded in popular usage.[2] Hence it is not altogether satisfactory. But if words are to be useful in scientific discussions, they must have some settled meaning, and this seems the most eligible.[3]

Nationalism as a political force

The importance of the principle of nationality in modern politics results from the tendency on the part of members of a nation to wish to dominate the state of which they happen to be a part or, failing in that, to organize a state of their own. This tendency had become so evident by the middle of the nineteenth century as to

[1] Harry E. Barnes, "Nationalism," in the *Encyclopedia Americana* (1919).

[2] An interesting discussion of the psychological basis of nationalism in modern politics is contained in Professor Walter B. Pillsbury's *The Psychology of Nationality and Internationalism.* (New York, 1919.) See especially his chapters on "The Nation as a Psychological Unit," and "Nationality and the State." But he fails to appreciate the relation of nationality to a definite home country and consequently misses the true distinction between a nation and a state. His analysis of the workings of national sentiment, however, is very instructive. See also Alfred E. Zimmern, *Nationality and Government* (London, 1917), and Sydney Herbert, *Nationality and Its Problems* (London, 1920).

[3] Viscount Bryce, whose authority among modern political scientists is second to none, adopts a different definition. In his book, *South America,* (revised edition, p. 424), he inquires, What is a nation? and answers his question as follows: "It is dangerous to offer a definition which may not correspond to usage, for usage is the only true master and interpreter of words, and usage is in this case loose and varying. But it might not be far wide of the mark to say that while a nationality is a population held together by certain ties, as for example, language and literature, ideas, customs, and traditions, in such wise as to feel itself a coherent unity, distinct from other populations similarly held together by like ties of their own, a nation is a nationality which has organized itself into a political body, either independent or desiring to be independent." Thus he defines nationality as nation is defined above, and uses the word nation as equivalent to what I prefer to call a national state. Bryce's definition of the terms is in accordance with the usage of many less weighty authorities, but on the whole the definitions adopted above seem more convenient, and are no more inconsistent with prevailing usage which, as Bryce properly observes, is loose and varying.

lead some of the most intelligent writers on politics to pronounce it an essential part of the sentiment of nationality itself. John Stuart Mill, the leading liberal British political philosopher of his time, writing in 1861, declared that the common sympathies which unite a portion of mankind into a nation, "make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be a government by themselves or a portion of themselves exclusively."[1] If that sentiment of loyalty to the group was not strong enough to produce the desire for political unity in a national state, it was not, according to Mill, true national sentiment and the group was not a genuine nation. Ernest Rénan, the gifted French thinker, held a similar opinion. Writing in 1882, he declared that for the existence of a nation there is necessary, not only a people with a common heritage of memories, but also a general desire to live together in the same state, in order thereby the better to secure the transmission of their heritage to their posterity.[2] A national desire for a national state is not, strictly speaking, an essential part of the sentiment of nationality; but it is the aspect of nationality that is of political consequence. The conscious and deliberate efforts of nations to dominate the states to which their members belong or establish independent states of their own, is what is meant by nationalism in modern politics.

[1] J. S. Mill, *Representative Government,* Chapter XVI.

[2] Ernest Rénan, *Qu' est-ce qu'une Nation?* 1882. Discourses et Conferences, 2d edition, p. 277. Cited with approval by Dunning, *A History of Political Theories from Rousseau to Spencer,* Chapter III, pp. 338-339. Having excluded all external criteria, Rénan concludes that a nation exists when:

(1) a community possesses a common heritage of memories, whether of achievement and glory, or of suffering and sacrifice;

(2) its members wish on that account to live together in the same state and transmit their heritage to their posterity.

Thus, as Fichte argued, devotion to a sentiment of nationality helps to satisfy the individual's craving for immortality.

2

Origin of nationalism

The beginnings of something akin to modern nationalism may be traced back to the late Middle Ages. In England statutes of *praemunire* were passed under the later Plantagenets to define and punish the offense of obeying or furthering other authority in the realm than that of the crown. These statutes were directed especially against the alleged usurpations of the Papacy, but undoubtedly reflected to some extent a growing disposition to prefer the authority of native rulers to that of aliens, whether ecclesiastics or not. On the continent of Europe a similar feeling was manifested by the supporters of the royal and imperial causes in France and Germany in their struggles for territorial supremacy. But the first great nationalist of a modern type was Machiavelli. He witnessed the ineffectual struggles of the prosperous but disunited Italian city-states to repel the aggressions of powerful and greedy territorial magnates such as the kings of France and Spain. He realized that even a rich capitalistic state like Florence could not defend its liberties alone and unaided and that co-operation between all the Italian republics and principalities was the indispensable condition for the independence of each. He was willing to have his city merged into a single Italian state, if that state would be powerful enough to protect the interests of Florence. But he was ahead of his times. The idea of an Italian nation was beyond the comprehension of the people of Florence and Venice and Genoa and Milan, and the other great city-states of that period. His dream of an Italian Commonwealth which should mobilize the resources of Italy against the French and Spanish barbarians dissolved before the indifference of a wealthy and cultivated but politically unprogressive generation of men. For more than three centuries Italy's first national

republican was remembered chiefly as a sort of privy councilor of alien princes.

Effect of Protestant Reformation

The true source of modern nationalism may be discovered in the period of the Reformation. Though religious sentiment was the dominant factor in popular political movements, the Protestant emphasis upon the right of private judgment in ecclesiastical affairs encouraged independence of thought also with respect to affairs of state. Peoples who successfully exercised the right of self-determination in religion were more likely to wish to do so in politics. Thus the initial revolt of the Spanish Netherlands was caused mainly by religious persecution; but the meteoric rise of the Dutch Republic cannot be adequately explained without reference to the influence of national sentiment. Nationalism scored another early triumph in the separation of Portugal from the dominion of the Spanish Hapsburgs, but failed in the remainder of the Iberian Peninsula, where the peoples of Castile and Aragon and the other parts of Spain were welded into a single state by the skillful statesmanship of Ferdinand and Isabella and their grandson, the Emperor Charles. National sentiment, moreover, failed to keep England and Scotland apart, and failed to bring together the peoples of the petty states of Germany and Italy.

Nationalism during the age of absolutism

In general, during the age of political absolutism and religious intolerance, the rights of nations were neither recognized by the reigning families nor asserted by the subject peoples. Dynastic, not national, interests determined political frontiers, and affairs of state were conducted with little reference to popular desires. The cardinal principle of statecraft, after the religious wars came to an end in 1648, was that of the balance of power. The wars between states were waged for inheritances or dependencies. Since interdynastic controversies did not affect national interests, it was often impracticable to rouse

the national passions. International law was a branch of the social etiquette of sovereign lords and kings.

Significance of the partition of Poland

But there was a country whose king could not be admitted into the family of territorial sovereigns. Poland with its elective monarchy, as Lord Acton has pointed out,[1] did not offer those securities for stability which were elsewhere supplied by the theory of legitimacy and the practice of dynastic connections. "A monarch without royal blood, a crown bestowed by the nation, were an anomaly and an outrage in that age of dynastic absolutism. The country was excluded from the European system by the nature of its institutions. It excited a cupidity which could not be satisfied. It gave the reigning families of Europe no hope of permanently strengthening themselves by intermarriage with its rulers, or of obtaining it by bequest or by inheritance." Since the ordinary methods of political aggrandizement were futile, the neighboring powers each for itself first tried by intrigue to prevail at the royal elections, and at last conspired to divide among themselves what they could not separately control in its entirety. The partition of Poland was the first occasion in modern times when a great state was suppressed, and a whole nation divided among its enemies. But it was not an act of wanton violence. It was the logical consequence of the political principles of the age of absolutism. "This famous measure," Lord Acton observed, "the most revolutionary act of the old absolutism, awakened the theory of nationality in Europe. . . . Thence forward there was a nation demanding to be united in a state, a soul, as it were, wandering in search of a body in which to begin life over again."

Nationalism and the French Revolution

Nationalism first became an important factor in modern politics during the French Revolution. Threatened with destruction by the reactionary Powers of Europe, the joint

[1] Lord Acton, *The History of Freedom and Other Essays*, pp. 274-275.

government of king and representatives of the people passed into the hands of the Jacobins and the monarchy was transformed into the republic. The early popular enthusiasm for fraternity among all mankind crystallized into a frenzied determination that France with its institutions should belong to the people who inhabited it. Thus national sentiment was united with patriotism and from the union sprang a national state which quickly demonstrated its superiority over the dynastic states of the old régime. The military dictatorship of Napoleon intensified the sentiment of nationality in France. His great victories and greater defeats left a heritage of glory and sacrifice which bound the nation together by the strongest ties. The Napoleonic supremacy also stimulated the growth of nationalism in the countries which he overran, especially in Germany and Spain, where his aggressions eventually provoked popular uprisings comparable only to the rising of the French in 1793.

Effect of the Restoration

But the new nationalism was crushed at the Restoration. Between the Jacobin yearning for popular sovereignty upon the original principles of the Revolution, and the solicitude of the privileged orders for the interests of absolutism, there was little room for the sentiment of nationality. The rights of nations received scant consideration at the Congress of Vienna, and none at all from the Holy Alliance. The German Confederation, organized by the diplomats of the Restoration upon the ruins of the Holy Roman Empire in a show of devotion to nationalist ideas, was the mockery of a national state. Italy, as Metternich cynically boasted, was but a geographical expression. Poland was not even that. It remained only a memory. Even the Holy See, so brazen were the pretensions of the reigning families, had difficulty in recovering its lost possessions. Lord Acton has exposed the ingratitude and the folly of those reactionary

statesmen.[1] "The governments of the Holy Alliance," he wrote, "devoted themselves to suppress with equal care the revolutionary spirit by which they had been threatened, and the national spirit by which they had been restored."

Nationalism and democracy

Such a policy was bound to result in a reunion of the two forces associated respectively with the rights of nations and the rights of man, nationalism and democracy. In 1821 the new era was inaugurated by the revolt of the Greeks against the Turks. The genius and the heroism of a brilliant company of young men, of whom the best known now is Byron, raised the nationalist cause from the low plane of vulgar insurrection to that of the highest romance. All Christian Europe and even distant America were touched and the peoples everywhere poured out their sympathy for the oppressed nation. The reactionary Powers were forced to intervene in favor of the Greeks against their legitimate rulers. Popular and nationalist sentiment scored its first triumph over the absolutist principles of the Holy Alliance. Presently (1830) the French again foreed a Bourbon king by divine right to make way for a sovereign who should rule by the will of the people. In the same year the Belgians refused longer to submit to the authority of the King of Holland. The reactionary Powers did not dare to refuse recognition to these *faits accomplis,* and the spell which the Congress of Vienna had cast upon Europe was finally broken. Also in 1830 the Poles rose against the Czar of All the Russias and the sympathies of the Western peoples were again poured out for an oppressed nation. The speedy subjugation of the Poles was a Pyrrhic victory for the cause of absolutism. National sentiment everywhere was inflamed by the plight of this nation whose aspirations for a state of its own were so ruthlessly frustrated.

From the defeat of nationalism in Poland to the revo-

[1] Lord Acton, *The History of Freedom and Other Essays,* p. 283.

Nationalism: the last phase

lutionary year, 1848, was a period of development. The nationalist movement gained consistency and recruited its strength. In Germany and Italy the nationalism provoked by Napoleon was a movement in the interest of legitimacy, one of the leading principles of the *ancien régime*. But the Greeks, the Belgians, and the Poles did not fight for any such principle. They fought against the Turk, the Hollander, and the Russian, not as usurpers like Napoleon, but as tyrants like the Bourbons and the Hapsburgs. Now came a new phase, a third stage in the development of nationalism. People began to feel that they would not be governed by foreigners anyhow, whether the authority of the latter was legitimate or illegitimate, whether exercised oppressively or with moderation. They desired that the rights of nations, like those of religions in earlier ages, should prevail over all other rights, and the achievement of their desires was made easier by the blind resistance of the reactionary powers to the recognition of popular rights of any kind.

The self-determination of peoples

This was the last phase in the development of nationalism. It was finally expressed in the principle of politics already quoted from Mill. Each nation should form a separate state; each state should comprise a single nation. This principle meant revolution in every state where there was more than one nation and by every nation dispersed among several states or overshadowed in any particular state by another nation. It meant revolution, whether the government of the state concerned was autocratic or popular. But it meant revolution most emphatically in states whose governments were both anti-national and unpopular. Thus from the sentiment of nationality, amidst the reactionary politics of the age of Metternich, sprang the modern principle of the self-determination of peoples.

The history of the principle of the self-determination

of peoples since 1848 may be lightly sketched. Temporarily triumphant in the year of revolution at all the leading continental capitals, it failed to accomplish at that time any permanent results. In Paris, the Second Republic was betrayed and destroyed by Louis Napoleon. In Berlin and in Vienna the forces of reaction, at first demoralized and put to flight, presently recovered their lost positions. The efforts of the National Assembly at Frankfort to establish a German national state on a democratic foundation were frustrated, and the German Nationalists were dispersed. The Hungarian and Bohemian and Italian Nationalists were subdued. In Rome the Republic of Mazzini and Garibaldi was established for a brief season, then the papal authority again prevailed in the states of the Holy See. Everywhere the nationalist leaders were driven into exile, and the legitimate sovereigns, except in France, reigned once more.

Nationalism in 1848

But the sentiment of nationality could not be denied. In Prussia, the legitimist statesman, Bismarck, set himself the task which the revolutionary nationalists had failed to accomplish, and by his policy of blood and iron eventually established a German state, a state, however, which, because of the exclusion of the Germans in Austria, was an incomplete realization of the national aspirations. In Piedmont, the legitimist statesman, Cavour, set himself a similar task, and by a less lavish expenditure of blood and iron, though not with less craft, the union of most Italians in a single state was eventually achieved. In Hungary the Nationalists by a policy of skillful fishing in troubled waters likewise eventually accomplished what they had failed to bring about by force in 1848. But in Bohemia, in Poland, and among the Slavic and other Christian peoples in the Turkish dominions, the triumph of nationalism was long delayed. Successive wars against Turkey gradually produced the group of incomplete Balkan states,

Nationalism since 1848

the unsatisfied nationalistic aspirations of whose peoples ultimately furnished the occasion of the World War.

The climax of nationalism at Versailles

The peace of Versailles was the grand climax of nationalism. The French and the Danes regained their lost provinces. *Italia irredenta* was redeemed. Czechoslovakia was created to satisfy the nationalistic aspirations of the Czechs and their kindred. The Jugoslavic peoples were also united in a single state. The Greeks at last were reunited. Greatest triumph of all, Poland was made whole again for the Poles. Great Britain recognized in some degree the nationalistic aspirations of her Egyptian and Indian subjects. Even in America with its mixture of many nations the Senate, though rejecting the treaty, formally endorsed the principle of self-determination.

The dissatisfaction of peoples

The claims, however, which had been advanced in the name of the rights of nations were not yet satisfied. In Ireland the greater part of the inhabitants claimed the same right of self-determination as had been granted to Poles, Czechs, Serbs, and other peoples formerly under Hohenzollern or Hapsburg rule. To be sure, Irishmen participated in the government of the United Kingdom on the same terms as Scotchmen and Welshmen and even Englishmen. But the United Kingdom did not serve their political ends as well as it served those of Scotchmen and Welshmen and Englishmen. On the other hand, it served the ends of a minority of Irishmen better than they deemed any independent Irish state capable of serving them. Out of this welter of conflicting interests the Irish Free State presently emerged. The Egyptians and the Indians continued dissatisfied with their position in the British Empire. The former succeeded in extorting the grant of an at least nominal independence; the latter, of a substantial measure of self-government. The Koreans, likewise, professed dissatisfaction with their incorporation

into the Japanese Empire and begged for the restoration of their former national state. Several of the peoples once incorporated in the Russian Empire submitted impatiently to the rule of the Soviet Republic. The Finns secured prompt recognition of their new national state. Some of the others, notably the Esthonians, the Letts, and the Lithuanians, succeeded in establishing a precarious and uneasy independence. The future of the Ukrainians, the Georgians, and the Moslem peoples of the Caucasus and of Asia remained uncertain. The Albanians, however, eventually made good their independence of Italians, Greeks, and Serbs, and in the North of Africa the Moroccans strove to break the chains which Spain had fastened upon them. But the great achievements of the Versailles Peace Conference had not been accomplished without violence to the integrity of the German, Hungarian, Bulgarian, and Turkish peoples. It was evident that, if the principle of self-determination were to continue to mean the self-determination of nations, nationalism must continue to be in many parts of the world a revolutionary political force.

3

Nationalism not an inevitable consequence of national sentiment

Nationalism, however, is not an inevitable result of the sentiment of nationality. The Scotch and the Welsh as well as the Irish are nations, but there is no political movement in modern Scotland or Wales akin to Irish nationalism. In Belgium the Flemish and the Walloons belong to different cultural groups, but they have formed a single and extraordinarily robust state. In Switzerland, the German, French, and Italian Swiss belong respectively to the German, French, and Italian nations, but there is no German, French, or Italian nationalism. Although the Swiss are not a culturally homogeneous group, they form one of the firmest states in the world. In the late Austro-

Hungarian dual monarchy, there were many nations, or parts of nations, but nationalist movements were strong only among the Hungarians, the Italians, the Poles, the Czechs, the Serbs, and the Rumanians. The Croats, Slovenes, Slovaks, and Ruthenians did not manifest separate nationalistic tendencies, and all merged into national states organized primarily by members of culturally dissimilar groups. Though they could not hope to dominate these new states, they seem to have acquiesced, but not always ungrudgingly, in their new political affiliations.

Nationalism not an essential characteristic of nations

Nationalism, therefore, cannot be deemed an essential characteristic of a nation. It has not flourished except where a culturally homogeneous group has formed part of a state in which it has had no satisfactory share in the conduct of public affairs, either because excluded altogether from any participation in the government or because admitted only on terms which ensure the predominance of some other group in the state. In other words, it has flourished under conditions which have tended in modern times to produce political discontent regardless of cultural differences among the people of a state. But where a group has been so weak or so unfavorably situated as to have little hope of securing either a national state of its own or a dominating influence in any other state, nationalism has not flourished, even though there might be consciousness of cultural unity and hostility towards an arbitrary and oppressive rule. Under such conditions organized discontent has expressed itself in other ways. In Russia before the Revolution there were strong nationalist movements among the Poles and Finns, but comparatively little nationalism among the Letts, Lithuanians, and Esthonians. The latter were often revolutionists, generally of a socialist bent, but infrequently nationalists.

Nationalist politics have accordingly taken two dif-

ferent forms. On the one hand, there have been those nationalists who, like the great Italian agitator, Mazzini, seemed to believe that compact homogeneous nations are always to be found inhabiting definitely circumscribed territories which may easily be set apart for their exclusive use without interference with equal opportunities for other nations. Italy, indeed, was a country in which these conditions were almost completely satisfied. Natural boundaries coincided closely with national boundaries. A national state could be established with defensible frontiers and without trespassing on the territory of other nations. Under such circumstances Mill was justified in asserting[1] that "where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all the members of the nationality [nation] under the same government, and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed." In fact, the determination of the Italians at the Versailles Peace Conference to secure strong strategic frontiers resulted in the inclusion of some non-Italians in their completed national state. Nevertheless, it was physically possible to have constructed the Italian state upon the principle of self-determination without disregarding the national sentiment of any substantial body of people.

Two forms of nationalism:

1. The nationalism of Mazzini

But this was not always possible. Many Germans, for example, were so scattered about among other nations, especially among the Poles and the peoples of the Danube valley, that it was not possible to bring them all together in a single compact state, nor in any one state without including many members of other nations. The same was true of the members of other nations in Central Europe and in the Balkans. Bismarck deliberately adopted a radically different policy from that proposed by

2. Bismark's policy of the Kulturstaat

[1] *Representative Government,* Chapter XVI.

Mazzini and endorsed by Mill. Since the peoples of Central Europe had not been made Germans by nature, he would Germanize them by the arts of statesmanship. He would teach their children German in the state schools. He would make them speak German in the halls of legislation, the courts and administrative offices, and in the public institutions. He would make them read German in their daily work and as far as possible in their literature. In short, he would manufacture good will towards Germany by state control of opinion. Such a process of Germanization was practicable only on a limited scale. The German state must not try to absorb more non-Germans than it could readily assimilate. But it should not hesitate to incorporate as many French, Danes, and Poles, as would through such a process add to its resources and increase its strength. So instead of a national state he organized a *Kulturstaat.*

Nationalism throughout Central Europe generally adopted the policy of Bismarck. No other plan seemed practicable. Poles could not satisfy their national aspirations without including within the limits of their state Germans and Czechs and Lithuanians and Ruthenians and White Russians, or leaving some Poles outside. Czechoslovakia must include German-Austrians and Hungarians or leave some Czechs or Slovaks out. National boundaries are not coterminous with any geographical boundaries that are possible for such states. In Central Europe it seemed that national states would have to be *Kulturstaaten.* But *Kulturstaaten* cannot be justified upon the principle of self-determination as understood by Mazzini and expounded by Mill.

The intolerance of the Kulturstaat

A *Kulturstaat,* like the church-state during the age of absolutism, is condemned by its nature to practice intolerance. But intolerance is incompatible with the revolutionary spirit, to which in modern times the better type of

national state has owed its existence. Thus among the Germans in Austria there was no strong support for the Pan-German movement after its collapse in 1848, until all hope of domination in the valley of the Danube through the instrumentality of the Austrian Empire had been lost. Their nationalism spent itself in efforts to maintain their supremacy over the other Central European peoples. Among the Hungarians there was a strong nationalist movement in the middle of the nineteenth century. Its eloquent leader, Kossuth, after his flight from the country following the crushing of the rising of 1848, met in America a warmer reception than any other European save only Lafayette. The defeat in 1848 delayed, but did not prevent, the eventual establishment of a Magyar national state. In 1867, the Hungarians, taking advantage of the humiliation of Austria by Prussia, forced the Austrians to consent to the *Ausgleich,* by which they became partners in the management of the Empire. But this triumph of Hungarian nationalism did not produce a more tolerant policy towards the political aspirations of other subject nations in the Austro-Hungarian Empire. They continued to oppress Czechs and Serbs and Rumanians, as the Austrians had once oppressed them. During the Great War Irish nationalists organized the movement known as Sinn Fein, but the independent state which they wished to establish was not to consist of themselves alone. It was to include all the inhabitants of Ireland, regardless of cultural differences. The principle of self-determination might not be invoked by others within the territorial limits they had marked for their own state without their consent. Such nationalism, like absolutism, demands unlimited authority for the legitimate sovereign, that is, the sovereign nation. It marks the parting of the ways traversed together during much of the last century by the

cause of the rights of nations and that of the rights of man.

Bismarck's nationalistic Kultur-kampf

The greatest statesman of the *Kulturstaat,* Bismarck, pursued the same policy in adjusting the relations between state and nation as in adjusting those between state and church. His attempt to assert the supremacy of the Lutheran German state in spiritual affairs produced the so-called *Kulturkampf* with the apostolic Roman Catholic Church, which resulted in his profound humiliation. His policy towards the subject peoples within the Empire precipitated a real *Kulturkampf.* French, Poles, and Danes proved no less unsubmissive to Prussianization than Roman Catholics. Eventually this controversy resulted even more disastrously for the German Empire, though Bismarck himself was not compelled to "go to Canossa" as in his controversy with the Church. Since it could not be brought to a favorable issue under the Hohenzollerns by any repressive legislation, it was terminated at the Peace of Versailles by the release of the subject peoples from their bondage to the Empire. From a *Kulturstaat* Germany was transformed into a genuine national state. The work of Bismarck was largely undone, and the vision of a democratic German state, which had inspired the revolutionary nationalists of 1848, was at last realized, except for the exclusion of the Germans in Austria and the other succession-states.

The strength of nationalism

The history of nationalism in Europe reveals both the strength and the weakness of that political movement. Its strength lay in its association with the democratic movement of the nineteenth century, the movement inaugurated by the French Revolution. It contributed greatly to the progress of democracy, especially in the latter part of the nineteenth century and in the early twentieth. Though it also strengthened for a time the foundations of states that were not democratic, this proved a merely temporary

effect. Its great achievement was in the building of the foundations of the democratic national state. The explanation of this achievement is plain. The principle of popular sovereignty assumes the existence of a self-determined body of people. The principle of nationality supplies a test by which the existence of a self-determined body of people may be recognized, both by the members of the body and by strangers. But such a test necessarily is subjective in character, and uncertain in application.

Its defects: 1. Uncertainty

This uncertainty concerning the degree of force attained by the sentiment of nationality among any particular people is the foremost defect of nationalism. It makes it too difficult to know precisely when a body of people ought to become a state. John Stuart Mill, for example, cannot be accused of any lack of sympathy for the nationalistic aspirations of oppressed peoples. Yet he utterly failed to gauge correctly the strength of national sentiment among the particular oppressed people about whom he should have been best informed, namely, the people of Ireland. The disestablishment of the Church of England in Ireland, he wrote in 1861,[1] would remove the causes of discontent on the part of the people of that country with their portion in the United Kingdom, and reconcile them to absorption into the British nation. The Church of England in Ireland was actually disestablished by Gladstone in 1869, a half century before the founding of the Irish Free State, and that concession to Irish sentiment from which so much was expected apparently had no effect upon the subsequent development of Irish nationalism. If genuine liberals like Mill were so far astray in their estimate of the force of nationalism in Ireland, what was to be expected of the conservative statesmen generally in power in states where nationalism might spring up?

Secondly, the fact that in general the boundaries of

[1] *Representative Government,* Chapter XVI.

2. Impracticability

nations do not coincide with those which are practicable for states makes a nationalist policy often difficult, sometimes impossible, to apply in a logical yet satisfactory manner. Either the members of different nations are so interspersed, at least near their points of contact, that no satisfactory line can be drawn between them; or frontiers determined by national sentiment are so incompatible with the natural boundaries of regions whose populations are united by common economic interests, that the organization of national states imposes grave economic disabilities upon their peoples. Palacký is reported to have said that, if the Austrian Empire did not exist, it would have to be created. There is much to support not precisely that, but a very similar proposition, namely, that, since the Austrian Empire has been destroyed and that kind of state cannot be recreated, it is necessary to organize a new state for the Danube valley, capable of exercising the authority requisite for utilizing economically and efficiently the common resources of its various regions. The failure to co-ordinate the activities of the Danube peoples, resulting from the dispersion of political authority in the valley among several hostile national states, is as calamitous as bad harvests or great conflagrations.

3. Intolerance

A third defect in modern nationalism has been its tendency to produce intolerance of minor national cultures by the dominant nation in a national state. How intolerant nationalism at worst might be Tsarist Russia showed. This intolerance, like the religious intolerance of an earlier period, has caused persistent persecution, untold suffering, and bitter hatreds. It has not only disrupted unsound states; it has disturbed the peace of the nations themselves.

Advantages of a blending of cultures

Life may be greatly enriched by the blending of cultures. As toleration of religious differences in modern states has improved the spiritual life of their peoples, so toleration of cultural differences should elevate their civilization. In

the Western Hemisphere states have grown by the immigration of people of many different cultures. But the general policy has not been to establish a *Kulturstaat* after the defunct German model by refashioning different peoples in a single mould. On the contrary, immigrant peoples have been generally encouraged to retain the best in their ancestral heritages. The culture of the new country is added to, not substituted for, that of the old. In Argentina, for example, Italians in large numbers have mingled with the original Spaniards. Although a new national culture is emerging, there is no attempt to repress the sentimental attachment to the literature and traditions of the home-country. In the United States the immigrants have been of many cultures, but the process of Americanization has consisted hitherto in an enlargement of opportunities, sanctioned by the promise of a common heritage for their posterity, regardless of differences in the heritages of the immigrants themselves. The heritage of the future will not be any particular one of the imported cultures, not even that originally brought over from England, but a blend of them all. States composed of mixed peoples must be founded on their community of interest in the promise of the future, regardless of their lack of common interests in the past.

The policy of cultural toleration

In dealing with cultural as with religious differences in modern states, the policy of toleration now clearly tends to prevail. The French and British in the Dominion of Canada are separated by manifest cultural as well as historical differences. But the French in Quebec and the British in the other provinces co-operate in maintaining an exceptionally stable state. The Dutch and British in South Africa are also separated by substantial cultural differences and were fighting one another much more recently than the French and British in Canada, but they, too, have nevertheless succeeded in establishing what appears to be

a stable union. Evidently, national sentiment need not be such a stubborn and intractable thing as some statesmen have found it. The statesmen who revised the map of Europe at the Peace Conference of Versailles did so avowedly in accordance with the principle of self-determination, and by self-determination they meant the right of peoples united by ties of nationality to form states of their own. But they understood the difference between a *Kulturstaat* and a sound national state. To that extent at least they had profited by their knowledge of the history of nationalism. They were pledged to give due heed to national sentiment in their settlement of the boundaries of states, but they were careful to join together the right of nations to self-determination and the duty of the self-determined nation to tolerate cultural differences within the national state.

The rights of cultural minorities under the Treaty of Versailles

The nature of tolerant nationalism is well illustrated by the case of Poland. The thirteenth of the fourteen conditions of peace, set forth in President Wilson's address to the Congress of the United States on January 8, 1918, dealt with the Polish problem. "An independent Polish state," he said, "should be erected which should include the territories inhabited by indisputably Polish populations. . . ." When the peace-makers at Versailles came to consider the redemption of this pledge, they made provision for defining the boundaries of the new Polish state and for the settlement of certain disputed boundaries by plebiscites, in order to give effect to the wishes of the majority of the inhabitants in localities claimed by more than one state. Provision was also made for the obtaining of Polish nationality by Poles residing outside the boundaries of the new state and for its rejection by Germans residing in Poland who might wish to retain their German nationality. The treaty then further provides as follows:[1]

[1] Treaty of Versailles, Part III, section 93.

"Poland accepts and agrees to embody in a treaty with the principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the interests of inhabitants of Poland who differ from the majority of the population in race, language, or religion." The special treaty which was eventually ratified by Poland promised full and complete protection of life and liberty for all inhabitants without discrimination on account of race, nationality, language, or religion, equal civil and political rights for minorities, the free use of their languages, and the right to establish without interference by the authorities of the state their own religious, educational, and charitable institutions, and to conduct them autonomously. These provisions were designed especially to protect the Polish Jews, although their benefits would also accrue to Germans, Lithuanians, White Russians, Ukrainians, and others who might find themselves more or less discontented members of a Polish national state.

The treaties by which Czechoslovakia, the other new national state, came into existence, and the boundaries of Serbia, Rumania, and Greece were enlarged, provided similar protection for minor national groups against discrimination by the dominant nation. The peace-makers, with whatever other faults they may be charged, cannot justly be arraigned for indifference to the rights of cultural minorities within the newly created or expanded national states. They did not intend that the new national states should become *Kulturstaaten*.

The new national states:

1. Poland

The new national states, in framing their constitutional laws, did not fail to heed the obligations imposed upon them at birth. Poland, in the Constitution adopted March 17, 1921, expressly guaranteed to all its inhabitants, without distinction of extraction, nationality, language, race, or religion, full protection of life, liberty, and property.[1]

[1] Article 95.

All citizens are declared to be equal before the law.[1] Every citizen has the right of preserving his nationality and developing his mother tongue and national characteristics.[2] Special laws are to be enacted, in order to guarantee to minority peoples the full and free development of their national characteristics. To assist in such development autonomous unions of minorities are to be incorporated and granted powers similar to those conferred upon ordinary municipal corporations. Moreover, members of national, religious, or linguistic minorities are to have the same right as other citizens to organize and administer at their own expense charitable, religious, and social institutions, and schools and other educational institutions, and to use freely therein their own language, and to observe the rules of their religion.[3] Additional provisions secure the freedom of conscience and religion, and adjust the relations between churches and the state as carefully as those between the state and the various national groups.[4]

2. Czechoslovakia

The Czechoslovakian Constitution of February 29, 1920, contains similar provisions. Article 106 provides that all persons residing in the Czechoslovak Republic shall enjoy within its territory in equal measure with the citizens of the Republic complete and absolute security of life and liberty without regard to origin, nationality, language, race, or religion; and that exceptions to this principle may be made only so far as compatible with international law. The protection of national, religious, and racial minorities among the citizens of the Republic is most scrupulously guaranteed by a series of articles in a special section of the Constitution.[5] A special law,

[1] Article 96.
[2] Article 109.
[3] Article 110.
[4] Articles 111-116.
[5] Articles 128-134.

enacted on the same day as the Constitution was adopted, establishes the principles of language rights within the Republic, and makes the Czechoslovak language the official language of the Republic. This involves the acceptance of certain handicaps by citizens who do not understand the language. Doubtless both in Poland and Czechoslovakia unauthorized language discriminations persist and give rise to real grievances on the part of minorities. But these republics have fairly committed themselves to the principle of cultural toleration.

4

Zionism

Modern nationalism culminated in the Zionist movement. The Jews are bound to their ancestral home in Palestine by the strongest ties of religion, race, and culture. Their loyalty to their ancient creed and customs has made their lot an unhappy one throughout most of the ages since their dispersion, and in most of the lands to which they successively fled for refuge. The triumph of nationalism in the West threatened to make their lot perhaps harder, and at the same time stimulated the hope that they also might find a national home in their old land in the East, where they could erect a state of their own. Zionism was well organized before the World War, but the exigencies of that struggle gave its leaders their opportunity. In 1917 the British Government promised to use its influence to procure the establishment of a national home for the Jewish people in Palestine, and in 1922 the Council of the League of Nations finally issued to the British Government the mandate by authority of which the promise was to be fulfilled.

The Palestine mandate

But Christendom and Islam were also interested in the government of Palestine, and Christians and Mohammedans, especially Mohammedan Arabs, predominated in the native population. The establishment of a Jewish national

state was contingent upon some adjustment of these conflicting religious and nationalistic interests. The League of Nations was unable to devise, or at least the British Government was incapable of carrying into effect, any plan that would give the Jews a clear title to the exclusive possession of their national home. It was necessary to recognize the equal rights of the adherents of each of the three religions and of the members of all nations and races. At the outset the Jews would be a minority group, and could not hope to protect their own rights, much less to dominate the whole state, except as dependents upon a foreign power. Under such circumstances control over the State of Palestine was retained largely in the hands of the British mandatory. Under such a mandate Zionism could not, even if it wished, produce a *Kulturstaat*. No other kind of national state was possible. Jews in Palestine, like Jews elsewhere, will have to look for justice and the blessings of liberty to the formation of a state which will be a genuinely secular and non-national commonwealth.

Cultural toleration and religious toleration in the modern commonwealth

The history of Zionism is the best commentary upon modern nationalism as a whole. National sentiment has been a powerful factor in the cultural development of modern peoples. It has greatly stimulated the education of the masses. The nationalist movements to which it has given rise have greatly aided the progress of democracy. But the triumph of democracy can only pave the way for the oppression of nationalist minorities, unless dominant nations learn to temper power with toleration. They may be able to form nationalist states on the basis of a triumphant nationalism, but they cannot form true commonwealths, for the commonwealth must be founded upon purposes that may be held in common by all its peoples, not merely by those who belong to a privileged group. There are, to be sure, some states

so fortunately situated that the boundaries of a nation closely coincide with those of the state. The sentiment of common nationality coalesces with the patriotic sentiment of the people, and an extraordinarily firm foundation is laid for the existence of the state. In such states the problem of toleration does not arise.

Nationalism in the United States of America

But most of the Greater Powers are not so fortunately situated. The state must stand upon its own merits without the aid of an undivided national sentiment among its peoples, furnishing a special tie of peculiar dignity to bind them more firmly together. This is conspicuously the case in the United States, where so many different nations are mingled. In such a country nationalism as conceived by Mazzini and Mill is impossible. The Bismarckian policy of the *Kulturstaat* would merely foster the worst evils of "hyphenism." Such nationalism could only be a disruptive force, setting group against group, and adding to the unfortunate domestic conflicts which racial dissensions, transcending the ordinary national differences among its immigrant population, have notoriously produced. In the United States national toleration is no less essential than religious toleration to the unity of the body politic. Moreover, the promise of American life would be destroyed by the destruction of the cultural backgrounds of our immigrant races. In general the toleration of cultural differences among the people of a state, like the toleration of differences in religion, is the only practicable policy for the modern commonwealth.

Nationalism in the East

In states which, like the British Empire, have extended their dominion over many peoples in many lands, nationalism presents an even more difficult problem. National toleration has produced domestic tranquillity in regions dominated by peoples of European extraction. But it has failed to satisfy the aspirations of the natives of such lands as Egypt and India. In both these dependencies

nationalist movements have developed great strength. In Egypt, at least, the movement has reproduced the characteristics of European nationalism, and must run the same course unless suppressed by military force. In India a much more complicated situation exists. The sentiment of nationality cannot have the same significance as in the West. Religion and caste play a much greater part than in the West in splitting the population into fragments, and the members of various cultural groups, speaking different languages and conscious of different traditions, are united by ties of far less intensive character than those which produced the European nationalism of modern times. Indian nationalism is dependent upon a corporate sentiment which can be compared only to what does not exist in Europe, but which, if it did exist, would bind together all European peoples by common feelings of that peculiar intimacy and dignity which now relate to some particular locality, such as Germany, Italy, or Poland. Indian politics, indeed, is more comparable to the politics of Europe as a whole, than to that of any single national state. Nationalism in India cannot be the simple, straightforward thing that was nationalism in, let us say, Ireland. Nor can the Empire be held together indefinitely by the political ideas that have served so well in the self-governing overseas dominions.

Nationalism and race consciousness

Nationalism in the East is a different political phenomenon from that in the West. In the Near East, indeed, recent developments, following the break-up of the decrepit Ottoman Empire, reveal the awakening of true nationalistic sentiment among the Turks themselves and among some of the other Moslem peoples of the former Empire. But in the Far East nationalistic sentiment is a thinner and weaker tie. It does not yet appear that it is sufficiently strong and intense to supply a bond of union among the Indian peoples, which would hold them

together if British authority were removed. It is hardly sufficient to hold together the existing Chinese state. The Japanese, along with their acceptance of much of the form and manner of Western politics, have apparently acquired also the Western national spirit, and their Korean policy seems to have produced a nationalist movement there closely resembling the nationalism of the West. But in general, Oriental nationalism is blended with the larger problems arising out of the rivalries of races. The doctrine of self-determination may be understood, not as the self-determination of nations, but as racial self-determination. It has been so understood, for instance, by the more radical leaders of the movement for self-government in India. It is so understood also by the more radical of the negro leaders in the Western World, and since the World War has produced a characteristic Pan-Negro movement, with its racial congresses and its slogan of Africa for the Africans. Marcus Garvey and the Universal Negro Improvement Association, with its subsidiaries, the Negro Factories Corporation, the Black Star Line, and the African Communities League, expressed this racial consciousness most significantly in America. But the problem of racial consciousness is more difficult than that of nationality, and cannot be so readily solved within the borders of modern states.

Roosevelt and the Japanese problem

Theodore Roosevelt in a letter to a Japanese friend of his, Viscount Kaneko, discussed this aspect of the matter with his luminous practical wisdom. He had in mind the problem growing out of the friction between members of the white and yellow races in the western part of the United States. Commenting on the great progress with respect to international relations which all civilized nations have made in the last few centuries, he said: "All have advanced, and especially in the way in which the people of each treat the people of other nationalities. Two centuries

ago there was the greatest suspicion and malevolence exhibited by all the people, high and low, of each European country, for all the people high and low of every other European country, with but few exceptions. The cultivated people of the different countries, however, had already begun to treat with one another on good terms. But when, for instance, the Huguenots were exiled from France and great numbers of Huguenot workmen went to England, their presence excited the most violent hostility, manifesting itself even in mob violence among the English workmen. The men were closely allied by race and religion, they had practically the same type of ancestral culture, and yet they were unable to get on together. Two centuries have passed, the world has moved forward, and now there could be no repetition of such hostilities. In the same way a marvelous progress has been made in the relations of Japan with the Occidental countries. Exactly as the educated classes in Europe, among the several nations, grew to be able to associate together generations before it was possible for such association to take place among men who had no such advantages of education, so it is evident we must not press too fast in bringing the laboring classes of Japan and America together. Already in these fifty years we have completely attained the goal as between the educated and the intellectual classes of the two countries. We must be content to wait another generation before we shall have made progress enough to permit the same close intimacy between the classes who have had less opportunity for cultivation, and whose lives are less easy, so that each has to feel, in earning its daily bread, the pressure of the competition of the other."[1]

Roosevelt's policy of keeping alien races apart by mutual consent, where consciousness of racial differences

[1] The letter was written from the White House in 1907 and is printed in Julian Street's *Mysterious Japan,* pp. 223-226.

is excessively acute, was expressed in the so-called "gentlemen's agreement" between the United States and Japan. By that farsighted arrangement racial friction was diminished and opportunity afforded for the gradual growth of mutual understanding on the part of all classes of each race.

The "Gentlemen's Agreement"

The problem is not so easily solved in those difficult cases where both races are already present in substantial numbers on the same soil. But, so long as they remain in close contact, there is no other policy possible for a modern commonwealth than that which has proved to be sound in dealing with conflicting sentiments of nationality in the same population. Racial may exceed nationalistic feeling in intensity, and its cause, being physical and not merely psychical, may be ineradicable, but it cannot become the basis of offensive political discriminations by the members of one race against another without impairing the character of the body politic. Inferior kinds of states may be governed by a dominant race in their own interest, with little or no regard for the interests of what they may be pleased to consider inferior races, which happen to be subject to their jurisdiction, but the true commonwealth must secure justice and liberty for all.

Racial distinctions and racial discriminations

The people of the United States wisely decided at the close of the Civil War that all persons should enjoy the equal protection of the laws, and that the right of citizens to vote should not be denied or abridged on account of race, color, or previous condition of servitude. Civil and political equality for members of all races alike is one of the obvious characteristics that distinguish a commonwealth from inferior types of states. There was nothing inconsistent with the principle of civil equality in the subsequent recognition by the Supreme Court of the validity of racial distinctions in American law, provided that they did not serve to camouflage unjust discriminations against

The political equality of races in the United States

the weaker race. But it was a mistake to carry the principle of political equality so far as to ignore real differences in the political capacity of individuals, irrespective of race, as was done by the Reconstruction Acts of 1867. The tangled skein of racial relations is no Gordian knot which one swift stroke can cut. The political problems growing out of interracial relations within a state may perhaps be solved by force if the dominant race is willing to pursue the methods employed by the Turks against the Armenians. The only alternative is tactful tolerance and good will. By the treatment which a dominant race accords to weaker races within a state it may be known whether or not that state tends to be a true commonwealth.

Imperialism, humanitarianism, and modern nationalism

It is an interesting speculation whether under present conditions a commonwealth is possible for peoples of various and markedly different races.[1] Englishmen like to talk about the British Commonwealth, by which they generally mean a body politic designed to secure justice and liberty for all the people of Great Britain. They sometimes talk about the British Commonwealth of Nations, by which they mean a similar body politic, embracing also the overseas dominions, inhabited by peoples of European extraction. But there seems to be little or no trace of such a corporate sentiment as would bind all the various peoples of the Empire in the same cordial union as that of the English and the Scotch. Modern imperialism does not mean a corporate sentiment, in the consciousness of which the peoples of empires find their bond of union. It means that policy of the Greater Powers which leads them to influence the management of weaker states and to control the destinies of backward peoples primarily in their own interest and for their own ends. It is a dangerous policy for any people to pursue who wish their state to be a true commonwealth, for the

[1] Cf. Graham Wallas, *Human Nature in Politics,* Part II, Chapter IV.

commonwealth must reflect the purposes and serve the ends of all its members. One can conceive of a sentiment of humanitarianism strong enough to furnish the foundation for a single universal commonwealth. The development of such a sentiment would be no more extraordinary than the evolution of nineteenth century nationalism from the tribal loyalties and petty clannishness of the barbarous ages. But there is little evidence of such a sentiment among the peoples of the world to-day. The nations are still very ignorant of one another. Racial consciousness, and the sentiment of nationality also, are likely to remain for a long time to come powerful factors in the politics of civilized states. In some cases they may make it easier for the people of the state to form a commonwealth; in most cases they will make the formation of commonwealths more difficult and the further progress of democracy less secure.

NOTES ON BOOKS

1. For significant interpretations of nationalism from various points of view, see the chapters on that subject in Mill's *Representative Government,* Wallas's *Human Nature in Politics,* and Dunning's *History of Political Theories: From Rousseau to Spencer,* and also Rabindranath Tagore's "Nationalism in the West" in *The Atlantic Monthly* (March, 1917). On the psychological aspects of nationalism, the fullest treatment will be found in W. B. Pillsbury's *The Psychology of Nationality and Internationalism* (1919). The most attractive side of modern nationalism is shown in A. E. Zimmern's *Nationality and Government* (1917), and the least attractive side in Treitzschke's *Politics* (English translation with introduction by A. J. Balfour and foreword by A. L. Lowell, 2 vols., 1916). See also H. W. C. Davis, *The Political Thought of Heinrich von Treitzschke* (1915). Perhaps the most serviceable single volume on the subject is Sydney Herbert's *Nationality and Its Problems* (1920). See also Ramsay Muir, *Nationalism and Internationalism* (1917).

2. The best introduction to the history of nationalism in Europe is G. P. Gooch's *Nationalism* (1920).

3. The triumph of nationalism at the Peace Conference of Versailles and the effort to prevent the rise of new *Kulturstaaten* is a topic on which there are not yet any adequate books. The approach to the subject can best be made by American readers through R. S. Baker's *Woodrow Wilson and World Settlement* (3 vols., 1922), and R. Lansing's *The Peace Negotiations; A Personal Narrative* (1921).

4. Instructive volumes on special problems of nationality and of race are F. Hackett's *Ireland, a Study in Nationalism* (1918) and H. M. Kallen's *Zionism and World Politics* (1921). On the problems of nationality in the United States a suggestive recent work is J. P. Gavit's *Americans by Choice* (1922) and the other volumes in the Americanization Studies of the Carnegie Corporation. On the negro problem see R. T. Kerlin's *The Voice of the Negro* (1920), and the report of the Chicago Commission on Race Relations, *The Negro in Chicago: A Study of Race Relations and a Race Riot* (1922). An introduction to the problem of the yellow races is afforded by R. L. Buell's *The Washington Conference* (1922).

CHAPTER V

THE STRUGGLE OF CLASSES

1

Principle of class-conscious proletarian solidarity

THE last of the three principles which have exerted the strongest influence in modern politics is that which was stated most forcefully by the learned Jewish economist and labor agitator, Karl Marx, in the epoch-making Communist Manifesto of 1848. "The immediate aim of the Communists," he wrote, "is the same as that of all the other proletarian parties: formation of the proletariat into a class, overthrow of the bourgeois supremacy, conquest of political power by the proletariat." In other words, the Marxian Communists believed that the proletariat should have its own state, just as many nationalists have believed that the national group should have its own state, and as the adherents of many religions have believed that the religious group should have its own state. Socialism or communism, therefore, regarded as a political movement, like clericalism and nationalism, raises the problem of the relations that should obtain between the state and a group within the state which is united by special interests and a corporate sentiment of its own. In the case of socialism and communism, this group is the class of proletarians.

What is the proletariat?

Proletarian was until recently a strange word in American political terminology. It is derived from the Latin word for offspring. A proletary in ancient Rome was a citizen of the lowest class, possessing no property and deemed capable of best serving the state by rearing numerous children. Hence the name. In modern times

Karl Marx's answer

the word may mean a member of the poorest and lowest class in any state. Marx, however, did not use the word so loosely. By proletarian he meant particularly those persons in the modern capitalistic state who possess no capital of their own, but work for wages and for the profit of the capitalists. There is room for much casuistry in drawing this line between the proletariat and the class of capitalists. There is a broad "twilight region" between the clearly distinguishable members of the two classes, occupied by large numbers of persons who toil for their living in the service of masters or employers or patrons and at the same time own to some extent the tools of various kinds with which they toil. Indeed, a tough-minded economist might argue, the rearing of a family is in itself a form of accumulation of capital, involving a considerable investment in that most precious of commodities, human strength and skill. The father of an able-bodied and well-disciplined brood is by paternal right a capitalist of no mean order.

The answer of the Russian Communists

Who, then, are the proletarians? The most authoritative answer is to be found in the constitution of the Russian Socialist Federated Soviet Republic, established by the Bolshevists after their revolution of November, 1917. Included are all who have acquired the means of livelihood through labor that is officially regarded as productive and useful to society, and also persons engaged in housekeeping which enables productive and useful laborers to do their work: in other words, laborers and employees of all grades engaged in industry, commerce, agriculture, etc., and peasants who employ no labor for the purpose of making profits, together with their wives, children, aged parents, and other natural dependents; as well as workers who have lost in any degree their capacity to work; also soldiers and sailors in the armed forces of the Soviet government. Excluded are all who employ

hired labor in order to obtain thereby an increase of profits, all who receive any "unearned" income, such as interest, rent, royalties, etc., merchants and brokers, monks and clergy of all denominations, and former officers and agents of the imperial police as well as members of the former reigning dynasty itself.[1] This distinction between proletariat and bourgeoisie is empirical rather than strictly logical, but practical Marxian politicians, whom the revolution brought into power, knew what they meant by proletarian well enough for their immediate political purposes. It may be that in a more advanced country than Russia the existence of a numerous class of humble workers, who nevertheless have more or less substantial savings bank accounts or life insurance policies, would have raised greater difficulties for the officials engaged in the actual classification of the people. Indeed, a wholly satisfactory objective test of membership in the proletariat is probably as unattainable as a similar test of nationality. The political significance of socialism, like that of clericalism and nationalism, springs from the consciousness of kind among the class of people concerned. Like ocean currents, these massive political movements have tremendous momentum and a well-established direction, but no clearly defined channels.

Marx's theory of proletarian class consciousness

When Marx wrote that the aim of the communists was to form the proletarians into a class, he did not mean to imply that they were not already a class in the sense that they were a group of persons having certain characteristic interests in common. He meant that the communists intended to make the proletarians conscious of the existence of their class and of its subjection in the capitalist state. It was more important to indicate the differences between the typical capitalist and the typical wage earner than to demonstrate that every individual could be pre-

[1] See Article IV, Chapter 13, §§ 64, 65.

cisely assigned to one class or the other. It was more important to emphasize the supremacy which the capitalist class or bourgeoisie actually enjoyed over the proletariat than to vindicate the entire adequacy of his analysis of modern capitalism. The influence of Marx's writings upon the workingmen of recent times, like that of Rousseau a century earlier, resulted less from the rigor of his logic than from the force of his rhetoric. A much better informed man than Rousseau, and gifted with a more intense singleness of purpose, if not with so skillful a pen, he drew upon his vast stores of knowledge to frame a merciless indictment of the captains of modern industry. Poverty, sin, and suffering he ascribed to the necessary operation of the capitalist system. To the sympathy which might be the natural bond of confederation between proletarians he added such a measure of antipathy and hatred of the bourgeoisie as to cement their confederacy into an indissoluble union. His greatest work, *The Capital,* exerts its indisputable influence upon the minds of men above all by enshrouding its readers in a thick and heavy atmosphere of gloom.

Economic basis of politics

The character of Marxian politics is determined by his maxim that economic and political power go hand in hand together. In the Communist Manifesto he pointed out how the modern bourgeoisie is the product of a long course of development, of a series of revolutions, as he phrased it, in the modes of production and exchange. Each step in the development of the bourgeoisie, he insisted, was accompanied by a corresponding political advance of that class. The last step was the industrial revolution, ushered in by the harnessing of steam, the heaping up of throngs of workers in great factories, and the establishment of the world market. At the same time the bourgeoisie conquered for itself in the modern representative state exclusive political sway. Hence his conclusion, already

quoted, that the executive of the modern state is but a committee for managing the common affairs of the whole capitalist class. The Marxian philosophy of the modern state was clearly summed up by one of the foremost of the German Marxian politicians, William Liebknecht, in his speech, "No Compromise, No Political Trading," delivered at the time when the French Socialist, Millerand, later President of the Republic, entered the Cabinet of Waldeck-Rousseau in order to help save the Republic from the monarchists. "While the bourgeoisie world of capitalism continues and the bourgeoisie rules, so long are all states necessarily class states, and all governments class governments, serving the purposes and interests of the ruling class and destined to lead the class struggle for the bourgeoisie against the proletariat—for capitalism against socialism, for our enemies and against us."

Economic determinism

The immediate aim of all proletarian parties may be, as Marx asserted, the conquest of political power, but evidently upon Marxian principles such a conquest is bound up with a larger enterprise, that of conquering economic power also. Such an enterprise might have daunted most men, but Marx had found a reason for believing—and this is his original contribution to the theory of modern socialism—that the conquest of economic power was inevitable, and hence that the political revolution, too, was certain to come and to end in victory for the proletarians. The reason for this belief was embodied in a proposition which Marx's enthusiastic co-worker, Frederick Engels, declared was "destined to do for history what Darwin's theory has done for biology."[1] Marx, he affirmed, had put the art of revolution upon a scientific basis. Marxians could pride themselves upon being—what their Utopian predecessors manifestly had

[1] Frederick Engels, *Preface to the English Edition of the Communist Manifesto,* published in 1888.

not been—scientific socialists, and could await the development of their social revolution with the same confidence that the astronomer in his observatory awaits the appearance of a solar eclipse. The proposition which was the basis of this confidence on the part of Marxians has been variously described as the materialistic interpretation of history or, more simply, as economic determinism.

The theory of class struggle

It is not necessary to give here any elaborate explanation of economic determinism.[1] A brief statement of the proposition as understood by Marx may be quoted from Engels, whose authority in this matter is second only to that of Marx himself. "In every historical epoch," he wrote,[2] "the prevailing mode of economic production and exchange, and the social organization necessarily following from it, form the basis upon which is built up, and from which alone can be explained, the political and intellectual history of that epoch." There can be no doubt of the importance of a materialistic or economic interpretation of history. Whether this be the only significant method of historical interpretation, or whether intellectual and spiritual interpretations may not also be serviceable, has been the subject of bitter controversy. The Marxians, at least, were satisfied that in the last analysis the economic interpretation was fundamental. Convinced of the truth of this major proposition, they had no difficulty in accepting the corollary, which Engels stated as follows: "Consequently the whole history of mankind . . . has been a history of class struggles, contests between exploiting and exploited, ruling and oppressed classes." The Communist Manifesto itself begins with this latter proposition. "The history of all hitherto existing society," it declares, "is the history of class struggles." And further

[1] For a full discussion see Edwin R. A. Seligman, *The Economic Interpretation of History.*

[2] Frederick Engels, *Preface to the English Edition of the Communist Manifesto,* published in 1888.

on the idea is elaborated. "The history of all past society has consisted in the development of class antagonisms, antagonisms that assumed different forms at different epochs. But whatever form they may have taken, one fact is common to all past ages, namely, the exploitation of one part of society by the other."

The inevitability of proletarian victory

Granting the inevitableness of class struggles of some sort, the question still remains unanswered, Is the triumph of the proletariat in its struggle with the bourgeoisie inevitable? Marx himself at times used language that might seem to throw doubt on the outcome of the struggle. Having begun by declaring that the history of society was the history of class struggles, he continued: "Freeman and slave, patrician and plebeian, lord and serf, guild-master and journeyman, in a word, oppressor and oppressed, stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary reconstitution of society at large, or in the common ruin of the contending classes." In the latter event it would seem that the triumph of an oppressed class was frustrated. The Marxian, however, must not take too narrow a view of historical processes. Ultimately, economic forces would produce their necessary consequences. Certainly, if the economic interpretation of history were true, they had produced such consequences in the past. They would continue to do so in the future, and the proletariat must ultimately prevail. In support of this supreme confidence Marx adduced a notable series of minor propositions.

The Marxian economics

To the demonstration of the validity of these minor propositions, Marx devoted the greater part of his life. (1) The domination of the proletariat by the capitalists through the control of the instruments of production; (2) the appropriation by them of the entire surplus product of

labor above the means of subsistence; (3) the increasing concentration of capital in the hands of the privileged classes, and the progressive impoverishment of the masses of the population; (4) the recurrence of commercial crises on account of the increasing difficulty on the part of the capitalists of selling back to the workers at a profit the surplus products of their toil; and, finally, the collapse of the capitalist system on account of the inability of the capitalists to exploit the workers any longer by such methods: these were the propositions about which for a half century classical and Marxian economists waged a war of words. Meanwhile wage earners went on reading the Communist Manifesto. They were unaware of the controversies of the economists. But they did not fail to note well Marx's original prediction. "The essential condition for the existence and for the sway of the bourgeois class is the formation and augmentation of [private] capital; the condition for [private] capital is wage-labor. Wage-labor rests exclusively on competition between the laborers. The advance of industry, whose involuntary promoter is the bourgeoisie, replaces the isolation of the laborers, due to competition, by their involuntary combination, due to association. The development of modern industry, therefore, cuts from under its feet the very foundation on which the bourgeoisie produces and appropriates products. What the bourgeoisie therefore produces, above all, are its own grave diggers. Its fall and the victory of the proletariat are equally inevitable."

The evolution of modern capitalism

Was the tendency of modern industry, as Marx asserted, toward a new form of political organization, as well as toward a new form of economic production and exchange? In 1848 there could be no controversy concerning the tendency in the more advanced industrial countries, above all in Great Britain, toward the production of manufactured goods on a large and ever larger scale. Likewise,

there could be no uncertainty about the increasing aggregation of wage earners in connection with large-scale production. As Marx correctly observed, the capitalists were bringing about the association and combination of their workers, involuntarily but inevitably. In course of time the involuntary combinations of workers within the factories led to voluntary combinations outside the factories. Trade unionism was nourished, and, gaining headway in the third quarter of the century, made rapid progress, especially in the industrial states of Great Britain and Germany, in the fourth. As Marx correctly predicted, along with the organization of labor went the development of class consciousness. The more intelligent wage earners could see it. Less intelligent wage earners could feel its effects and be influenced by them, though they might be unconscious of its existence. The demand for special legislation in the interest of the wage-earning class grew stronger, and as it strengthened, wage earners became more concerned about government. Class consciousness, like national sentiment, provoked a desire to make the government of the state more responsive to the group. If that could not be accomplished without a change in the form of government or in the organization of the state itself, class-conscious wage earners, like the nationalists, became political reformers or revolutionists. The controversies of the economists were beside the point, for the growth of class consciousness did not depend upon the logic of Marxian polemics but upon the logic of current events.

The necessity of political revolution

The first step in the proletarian revolution, Marx believed in 1848, was to raise the proletariat to the position of ruling class by physical force and violence. "The Communists," he wrote at the conclusion of the Manifesto, "disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible

overthrow of all existing conditions. Let the ruling classes tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win." Socialism, like nationalism, as matters stood at that time, had to exert its strength in order to achieve its ends. The established political order afforded little opportunity for class-conscious and culture-conscious groups of people to influence the conduct of public affairs. Representative government was insecurely established, where it existed at all, outside Great Britain, France, and Belgium. Manhood suffrage existed nowhere in Europe. Class-conscious and culture-conscious persons alike, if they believed that the majority were or might be on their side, were bound to believe in political democracy. Socialists and nationalists were nearly always democrats and often were democrats before they were socialists or nationalists. Democrats, nationalists and socialists, all were constrained, at least on the continent of Europe, to seek their ends by physical force and violence, because force was necessary to overcome the inertia of the established order. The Marxians did not differ from other revolutionists in their choice of methods. The only difference between them was in the use which they proposed to make of political power when it should be obtained.

The social revolution and the co-operative commonwealth

The authors of the Communist Manifesto proposed that the proletariat should use its power "to wrest by degrees all capital from the bourgeoisie, to centralize all instruments of production in the hands of the state, that is, of the proletariat organized as the ruling class, and to increase the total of productive forces as rapidly as possible." By this last Marx and Engels probably meant to put to work as rapidly as possible all who were living merely by owning capital. This might be done through the abolition of all rents, interest, and other charges for the use of capital, compelling the recipients of "unearned"

income to go to work in order to live. The communist scheme was a scheme for state socialism, in which the state would be identical in the first instance with the proletariat. But if the scheme were thoroughly executed, eventually there would be only one class, embracing all the people, and all would be engaged in the service of their state, that is, in production for use, never merely for profit. Such a state, Marxians have claimed, would be no class state, but a true commonwealth, the "Co-operative Commonwealth" which will mark the final stage in political evolution. It is the prediction of the coming of such a class-less state which forms the climax of Marx's economic interpretation of history. Engels summarizes this prophecy in his statement of Marx's "fundamental proposition," already quoted in part. He concludes: "The history of these class struggles forms a series of evolution in which nowadays a stage has been reached where the exploited and oppressed class, the proletariat, cannot attain its emancipation from the sway of the exploiting and ruling class, the bourgeoisie, without at the same time and once for all emancipating society at large from all exploitation, oppression, class distinctions, and class struggles."

The nature of the co-operative commonwealth

The idea of the class-less state is set forth more fully in the Communist Manifesto. "When in the course of development," it declares, "class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole nation, the public power will lose its political character. Political power, properly so-called, is merely the organized power of one class for oppressing another. If the proletariat during its contest with the bourgeoisie is compelled by the force of circumstances to organize itself as a class, if by means of a revolution it makes itself the ruling class and as such sweeps away by force the old conditions of production,

then it will along with these conditions have swept away the conditions for the existence of class antagonism and of classes generally, and will thereby have abolished its own supremacy as a class. In place of the old bourgeois society with its classes and class antagonisms we shall have an association, in which the free development of each is the condition for the free development of all." In other words, the ultimate aim of the communists was not the domination of the capitalist state by the class-conscious proletariat, but the destruction of class consciousness and the transformation of the competitive state into the co-operative commonwealth. The struggle of classes was to end in universal peace by the annihilation of the capitalists.

The dictatorship of the proletariat

This idea of the state is repeated in the New Communist Manifesto of 1919, promulgated at Moscow by the leaders of the Third International. Under the heading, "Democracy and Dictatorship," it declares that: "The proletarian State, like every State, is an organ of suppression, but it arrays itself against the opposition of the despoilers of labor, who are using every means in a desperate effort to stifle the revolution in blood and to make impossible further opposition. The dictatorship of the proletariat, which gives it a favored position in the community, is only a provisional institution. As the opposition of the bourgeoisie is broken, as it is expropriated and gradually absorbed into the working groups, the proletarian dictatorship disappears, until finally the State dies and there are no more class distinctions.

"Democracy so-called—that is, bourgeois democracy—is nothing more nor less than veiled dictatorship by the bourgeoisie. The much-vaunted 'popular will' exists as little as a unified people. In reality there are the classes, with antagonistic irreconcilable purposes. However, since the bourgeoisie is only a small minority, it needs this fiction of the 'popular will' as a flourish of fine sounding

words to reinforce its rule over the working classes and to impose its own class will upon the people. The proletariat, on the contrary, as the overwhelming majority of the people, openly exercises its class power by means of its mass organization and through its Soviets, in order to wipe out the privileges of the bourgeoisie and to secure the transition, rather the transformation, into a *class-less* Communist Commonwealth."[1]

2

The First International

The purpose of the Marxian revolutionists was in the first instance, however, the establishment of state socialism through the dictatorship of the proletariat. This purpose they failed to accomplish in 1848. The revolutionary nationalists were somewhat more successful. They overthrew the monarchy in France, temporarily established a republic, and permanently established manhood suffrage. In Germany, Austria-Hungary, and Italy, as has been pointed out, they scored some temporary successes, and laid the foundation for more substantial progress later. But, on the whole, the revolutionary year of 1848 was a disappointment to the enemies of the established order. French, Germans, and Italians made trivial gains; Magyars, Czechs, Poles, and other Slavic peoples none at all. Marxians had perhaps not much more reason to be discouraged than the others. In the period of reaction which followed, all kinds of revolutionary propaganda were driven under cover. Nationalism raised its head again in Italy in 1859. The dramatic exploits of Garibaldi stimulated the nationalists everywhere, especially the Germans, Poles, and Magyars. Conditions became more favorable

[1] From the New Communist Manifesto, issued by authority of the First Congress of the Communist International, held at Moscow, March 2-6, 1919, and signed by N. Lenin, G. Zinoviev, and L. Trotsky for the Russian Communist Party, C. Rakovsky for the Balkan Socialist Federation, and F. Platten for the Swiss Socialist Party. Printed in Raymond W. Postgate, *he Bolshevik Theory,* New York, 1920, Appendix II.

for revolutionary enterprises of all kinds. In 1864 the Marxians joined with other proletarian agitators to organize the International Workingmen's Association or simply, the International, as it has been called. The program of the dominant faction in this first International seems to have been that of the Communist Manifesto. In 1871 its leaders thought they saw their opportunity to seize power in connection with the insurrection in the capital of France, known to history as the Paris Commune. But that rising failed. And its failure brought about not only the collapse of the First International, but also the revision of the communists' political strategy.

The problem of tactics

The failure of the Commune demonstrated, Marx and Engels confessed in the preface to a new German edition of the Communist Manifesto, published in the following year, that "the working class can not simply lay hold of the ready-made state machinery and wield it for its own purpose." The proletariat would need machinery constructed with special reference to their revolutionary purpose. In order to be able to rely upon it, they must construct it themselves. Such a process involved careful preparation and deliberate action. It would take a longer time than they had originally expected. Meanwhile, the fateful operation of economic forces would be steadily converting the growing masses of wage earners to class consciousness. Such converts would form a surer foundation for the "revolution" than the impulsive followings of energetic agitators hastily improvised in the heat of active insurrection. Eventually, when the time should be ripe, power would fall into the hands of the wholly class-conscious proletariat with little, if any, violent struggle on their part. As the significance of the failure of the Commune came to be generally appreciated by the communists, the belief in the feasibility of an immediate revolution by physical force and violence waned. "Revolutionary"

tactics gave way to "evolutionary," and, the better to distinguish the new and more moderate policy from the old, the name "communist" was quietly dropped in favor of the less offensive term "socialist." How far Marx lent his authority to the new departure has been bitterly disputed among the socialists and communists of later years. Revolutionary action of every kind, except for Russian Nihilism, was at low ebb in the later years of his life, and the socialist movement reached its nadir. The organization of the British Fabian Society in 1883, the very year of Marx's death in his obscure London retreat, signalized the radical repudiation of the original Marxian propaganda.

The Second International

The new departure in the socialist movement was favored by the partial success which the nationalist movement had attained. The Second International, organized at the Paris World's Fair of 1889, was led by French and German socialists who enjoyed political opportunities denied to the revolutionists of 1848, nationalists and socialists alike. Manhood suffrage had been established for national elections. The secret ballot made possible a free vote. Socialists could be elected from working-class districts to the French Chamber of Deputies and to the German Imperial Assembly. There they could openly conduct their propaganda, enjoying the freedom of speech and immunity against arbitrary arrest possessed by all members of representative bodies in nationalist states. If in most of the other countries on the continent of Europe their immediate opportunities were more restricted, they might hope for the eventual triumph of democracy throughout Europe. Thereafter, if the Marxian social philosophy were sound, they ought inevitably to win by the ballot the political power which was for the present unattainable by the bullet. Thus socialism would ultimately prevail. Socialists might still talk about

the "revolution," but they now generally meant a revolution to be brought about by the power of class-conscious majorities in democratic elections. Nationalism by its alliance with democracy had become a tremendous force. Socialism should profit by a similar policy. The Second International proposed as its immediate aim the adoption of democratic political reforms in all capitalist states. As the democratization of the capitalist state proceeded, the gradual establishment of the co-operative commonwealth would be accomplished by constitutional methods. Thus the Second International became the organized expression of social democracy.

Socialism and democracy

Socialism and internationalism

The new departure was favored also by the failures of nationalism. The alliance of nationalism and democracy had done much for those nations which were in the best position to form national states of their own or to dominate the states of which they happened to form a part. But less favorably situated national groups lost some of their affection for that particular alliance, when they discovered what indignities could be visited upon them in the name of democracy in national states dominated by rival nations. Some of the European nationalists, whose aspirations remained unsatisfied, continued to advocate revolution by physical force and violence. But the progress of the art of war in modern times was making the task of the leaders of insurrections ever more difficult. The alliance of socialism and democracy in those states in which the triumph of nationalism had meant for the minor national groups not liberation but merely a change of masters, promised protection for such groups at least against oppression by the dominant nations. Nationalism did not exhaust the possibilities of democracy. Indeed, in certain respects, as the event proved after the Great War, it frustrated them. There was need for other forces to complete the transformation of the decrepit territorial

states of Central and Eastern Europe into vigorous modern commonwealths. For national groups whose habitats were not clearly defined the problem of finding a satisfactory basis for the state was not simple. The Jews especially, who were the victims of the worst oppression in the existing states, could not hope for much improvement in their condition from the establishment of national "culture states" on European soil. Some of them turned for relief to Zionism. To many of those not attracted by the idea of a national home in Palestine, where for a time at least they must be dependent on the favor of the benevolent World Powers, international socialism made a strong appeal. It was the logic of events that brought so many Jews into the socialist movement after the defects of nationalism had become manifest.

Political policy of the Second International

The Second International, like the First, was founded upon the proposition that the interests of the wage-earning class, wherever the members of that class might happen to be employed, were superior to those of any state, of which particular wage earners might form a part. The individual proletarian's first obligation was to his class. Loyalty to a state was a secondary consideration. Loyalty to a capitalist state, indeed, was disloyalty to the proletariat. But, pending the conquest of political power, the organizers of the Second International deemed it expedient to submit to the authority of the capitalist state in order to obtain the advantages, such as they might be, of constitutional protection for socialist propaganda. If socialists could win elections to representative bodies, so much the better, for they thereby secured the privileges and immunities of membership therein—above all, the privilege of freedom of speech and immunity against arbitrary arrest. But socialist representatives were supposed to abstain from participation in the making of

ministries or in the voting of budgets, and to assume no responsibility for the conduct of public affairs. They might exploit the opportunities afforded for socialist propaganda by the existence of capitalist states, but they might not sanction the states themselves.

Political success of the Second International

The Second International, unlike the First, seemed at one time fairly on the way to the conquest of power, despite the renunciation of physical force and violence. While discipline was not strict enough to prevent the occasional adoption of tactics inconsistent with its general strategy, and the class consciousness of European proletarians was not so intense as to prevent the dissipation of much energy in factious quarrels, there was sufficient vitality in the movement for substantial growth in numbers and influence. International congresses were held in Paris (1889), Zurich (1896), Paris (1900), Amsterdam (1904), Stuttgart (1907), and Copenhagen (1910). Attendance at these congresses and public interest in their proceedings steadily increased. The greatest of all the congresses would have met in Vienna in the summer of 1914 but for the outbreak of the World War. Permanent headquarters were maintained at Brussels, and a following was acquired in all parts of the world. In one country, Germany, the Social-Democracy formed on the eve of the war the largest organized political party in the state, and in several countries it was an important factor in national politics. Meanwhile, democracy was making rapid strides. In several countries the franchise was extended, or discriminations against the wage-earning class in the exercise of the suffrage were removed, and the political strength of the class-conscious proletariat steadily increased. Meanwhile, too, the continued development of capitalistic industry and the corresponding growth of the wage-earning population foreshadowed further increases of momentum for the socialist movement. But whatever power

socialists might gain was to be used for the benefit of the international proletariat, never for that of a capitalist state. And if that power was not sufficient in 1914 to dominate any bourgeois state, at least, socialists ventured to hope, it might suffice to frustrate the most nefarious bourgeois schemes, such as international wars for the enrichment of profiteers.

Collapse of international socialism in 1914

The outbreak of the Great War demonstrated the vanity of these hopes. Was the war for the benefit of the profiteers? Were the workers now to be exploited on the battle field as well as in the workshop? Upon Marxian principles there could be only one answer to these questions. And if the war were a capitalist war in the interest of the capitalist class, the duty of the proletariat in all the countries was to take no part in it, but leave the capitalists to fight their own battles. Members of the Second International should have refused to obey the call to arms, denying their obligations to the state in order to attest their loyalty to their class. Class-conscious proletarians professed submission to the authority of capitalist states in order to further the ends of the workingmen of the world, and should have repudiated their submission when those ends could no longer be served by that means. So a strict Marxian, whether of the First or the Second International, must have reasoned. But only a few of the leaders of the Second International reasoned in this way. Most of them counseled obedience to the orders of mobilization, and subsequently to the orders of the military leaders. Either they were not convinced that the war was a capitalist war, or they did not really believe that wage earners were bound to put their obligations to the international proletariat ahead of those to capitalist states. In any case, the workers in each of the countries almost to a man promptly subordinated the theoretical claims of the international proletariat to the practical

requirements of the national state. In France and Germany, where the Second International had its largest followings, the principal socialist leaders threw their support to their national governments, and in some cases even entered the governments themselves. Socialism, forced into direct competition with nationalism for the support of the wage earners of the warring Powers, failed to stand the test. Class consciousness, as a principle of political obligation, proved inferior to the traditional loyalty claimed by the national state.

The Russian Revolution

The Russian Revolution precipitated a new crisis in the socialist movement. The fall of the Romanoffs in the spring of 1917 left the Duma standing alone as the official embodiment of authority in the state. But the leaders of the Duma were unable to make good their claim to political leadership. The Czarist autocracy, despite its promises at the time of the Revolution of 1905, had not permitted the Duma to function freely as the representative of the Russian people. The limitation of its powers prevented it from gaining credit for constructive services to the people. The exclusion of the masses from any share in the elections deprived it of popularity. Its leaders were drawn largely from the rising industrial and professional classes in Russia, but these classes had no hold upon the affections of the artisans and peasants which would enable them to secure for themselves the personal loyalty which had formerly bound the masses to their Little Father, the Czar. The disappearance of the recognized head of the state and of the church left a void which no established organ of government and no existing privileged class could fill. In order to carry on public affairs the leaders of the Duma were compelled to call for help from the popular leaders, who had come to the front in the course of the insurrection. These leaders, like almost all popular leaders in imperial Russia, were professed

socialists. Finding power suddenly thrust upon them, they were forced to decide at once whether the revolution should immediately become a social revolution or proceed primarily as a political movement, until the time should be ripe for the establishment of the co-operative commonwealth. In other words, they were forced to choose between the policy of the First International and that of the Second.

Bolshevism

The Revolution of 1917 was not the first occasion that had brought the Russian socialists to the parting of the ways. During the Revolution of 1905 the same dilemma had arisen. At that time the socialists had split into two factions, the majority or Bolsheviki, holding to the original Marxian revolutionary program, the minority or Mensheviki, preferring the "evolutionary" policy which Marx seems to have favored towards the end of his life. But neither faction conquered power in 1905, and their differences remained of an academic character until the collapse of the old regime twelve years later. The Mensheviki continued to repeat the current arguments advanced by the leaders of the Second International, pointing to the backward condition of industry in Russia and asserting that the full development of the capitalist system must precede the social revolution. The only solid foundation for a socialist state, they insisted, is a mature capitalism. The Bolshevists replied that it would not be necessary in Russia to wait until capitalism had run its course. The merit of science is that it enables those who understand, not only to foresee the future, but in the light of that foresight to regulate the present so as to hasten its arrival. Scientific socialism, they maintained, is a movement which can itself lay the foundation for a socialist state without awaiting the slow operation of natural processes. If there were no scientific socialists to plan the co-operative commonwealth, the toiling masses would have to suffer until capi-

talists had carried their system of exploitation to such lengths that its collapse necessarily ensued. But such prolonged suffering was needless, since the leaders of the proletariat already knew what the results of that collapse must be and what measures might be expected to produce similar results, regardless of the unripeness of Russian capitalism. The Bolshevists intended to be the masters, not the victims, of their fate.

The failure of evolutionary socialism in Russia

The first socialist government in Russia was a government of moderate or evolutionary socialists. Consistent with their principles, they put political ahead of social reforms, even ahead of so necessary a reform as the distribution of the land among the peasants. First, they would hold a constitutional convention, and only when the democratic state was rightly constituted should the proper lawmaking body settle the land question and other social problems. Meanwhile they would keep Russia in the war, regardless of the uncertainty concerning the war aims of the fallen imperial government and its allies. In opposition to this program the Bolshevists set up a policy which was apparently much more simple and straightforward, and which was certainly more attractive to the ignorant and war-weary masses, especially to the peasants, impatient to possess the land and forming the bulk of the people. Their policy consisted of four measures: (1) immediate peace without victory; (2) the land for the peasants, without price and without delay; (3) the factories for the workers, also without price or delay; and (4) all power to the Soviets. The first measure meant the abandonment of the secret war aims of imperial Russia, and of the Allies, regardless of the effect upon the outcome of the war. The second meant the immediate eviction of the great landlords, whatever the ultimate disposition of the soil might be. The third meant the confiscation of all industrial property and the division among

the workers of the whole industrial product, regardless of claims for rent, interest, or profits. The fourth meant the exclusion of the old land-owning class and the business and professional men from any part in affairs of state, and the actual conduct of government by the councils of industrial wage earners, peasants, and soldiers. In the face of such promises the moderate socialists could not command the united support of the toiling masses, and the first Russian socialist government went down before the onslaught of the urban proletariat.

The triumph of the Soviets

The second socialist government, which followed the conquest of power by the Bolshevists at the revolution of November, 1917, proceeded to execute the original Marxian program. It called upon the workers of the whole world to unite and throw off the chains of capitalism. It promised a world-wide dictatorship of the proletariat in the interest of the wage-earning class regardless of religious or national differences, and, after the destruction of the privileged classes, the prompt establishment of the co-operative commonwealth. In order to carry on the propaganda for the social revolution more effectively, it organized the Third International, reviving the tradition of the First and challenging the authority of the Second.

The Third International

In order to make its appeal more convincing, the leaders dropped the discredited term, Socialist, and resumed the original name, Communist. But the Third International, like the Second, when brought into direct conflict with the dominant forces in modern politics, failed to command the allegiance of the toiling masses. Communism lacked the authority of nationalism and religion in the organization of society. Its appeal could not break the established habits of obedience. The combination of adverse opinion, force, and inertia was too much for the Marxian revolutionists in power at Moscow. The capitalist states stood fast against the assaults of the communist propaganda.

The failure of revolutionary communism

The Bolshevists failed to accomplish their intended revolution, even in the state where they had seized the power. They found that they could not secure peace for Russia without victory, but they did manage to win peace by the sword. This result strengthened their position as practical politicians, but impaired their prestige as political philosophers. They soon discovered also that they could not give the peasants the use of the land without in effect giving them the rights of ownership. This result gained the support of the peasants, but destroyed the symmetry of the communist state. Presently they learned that they could not operate the factories without employing managers of special skill, confiding to them superior authority, and offering them exceptional rewards. When they eventually made this concession to the spirit of modern capitalism, they were too late to maintain the productivity of Russian industry. At last they were compelled to invite foreign capitalists to return to Russia and assist in the restoration of prosperity. They found they could not attract the capitalists, except by offers of special privileges in the exploitation of natural resources and in the division of the profits of enterprise. The granting of such privileges betrayed the weakness of communism.

The conflict of urban and rural interests

Meanwhile, the greatest difficulties had arisen from the conflict of rural and urban interests. The failure to maintain the productivity of the factories and mills made it impossible for the urban proletariat to supply the peasants with the goods and services to which they were accustomed. The balance of trade between city and country was upset. The peasants were reluctant to exchange their foodstuffs and fuel for less than the usual equivalent in manufactured goods. The urban proletariat expected an equal division of the necessaries of life, despite the differences in productivity between city and country. The peasants desired free trade in the products of field and forest, in order that

they might secure for themselves the full product of their labor. The proletarian dictators were bound to oppose this breach of communist principles in order to keep down the cost of living in the cities. The result was a decline of production in country as well as city. Poverty and famine forced a reconsideration of communist policy. It became evident to the Bolshevists that they could organize their state only by abandoning their communism. If they could not operate the factories and cultivate the soil upon Marxian principles, they could at least maintain themselves in power. In short, the dictatorship of the proletariat in Russia produced, not a co-operative commonwealth, but an ordinary militarist state, a state to be sure greatly superior in certain respects to the autocracy of the Czars, but still a militarist state.

Final character of Soviet government

The causes of the collapse of communism in Russia are not obscure. First, the Bolshevists committed a fundamental error in the application of their principle of economic determinism. The truth of the proposition that economic conditions determine in the last analysis the social and political institutions of mankind may be granted, at least for the sake of the argument. But it does not follow that the underlying economic forces of the present or any other age will produce a particular change in economic conditions, and hence ultimately in social and political institutions also, within a definite period of time, or that the social and political changes of the moment will necessarily be in harmony with the tendency of the underlying economic changes. Such regularity and precision in the operation of economic forces is not indicated by the history of the past, and is not to be expected in the near future. A weather observer who ventured to base his daily forecasts on the assumption of a general change in the character of the climate, or even on his knowledge of the succession of the seasons, would be a poor scientist, however

Causes of the failure of communism in Russia

1. The fallacy of economic determinism

learned he might be in the principles of climatic revolution. Scarcely less absurd is the social or political scientist who predicts the immediate course of events on the basis of anticipated secular changes in the methods of producing wealth. Three generations have passed since the publication of the Communist Manifesto. Great changes have taken place. Their general character demonstrates that Marx was a man of extraordinary insight. In one sense of the term he was a major prophet. But he was a poor political scientist. Those of his followers who believed that the fiats of proletarian dictators could furnish an acceptable substitute for the operation of economic forces had misinterpreted the history of mankind.

2. Misunderstanding of human nature

Secondly, the Bolshevists failed to reckon on the facts of human nature. Authority in the modern state, as has been pointed out, does not rest exclusively, in many cases not even largely, on any rational calculation of interest by the bulk of those from whom obedience is claimed. It rests on deeply rooted impulses and instincts which men cannot disown. The strength of the state must vary with the intensity of the feelings by which its members are bound together. The communists were not unaware of this, as much of their discussion of class consciousness plainly shows. The foundation of authority in the communist state must in the first instance mainly be the class consciousness of the proletariat and the resulting disposition to subordinate all other considerations to the interests of the class. If the sentiment of loyalty to the wage-earning class is stronger than that which binds its members to other groups, the nation or the national state for instance, the foundation of the communist state is well laid. But if, as a matter of fact, other loyalties are more intense, a proletarian dictatorship in the interest of the wage-earning class is impossible. As a matter of fact, other loyalties were more intense in most of the capitalist

states. In Russia loyalty to the semi-capitalist, semi-feudal state of the Romanoffs was fragile enough. But the bulk of the masses, the peasants, felt no such sympathy with the urban proletariat as to subordinate their interests as tillers of the soil to those of the industrial wage earners. National sentiment, though weak, proved stronger than proletarian class-consciousness. Inertia, and lingering traces of deference to the former rulers of the state, made the establishment of communist rule difficult. Fear of the evicted landlords and for the safety of their newly won lands, rather than a deliberate preference for the Soviet government, constrained the peasants to a measure of obedience to the authorities at Moscow. In short, the psychology of the Bolshevists was as defective as their philosophy of history.

3. Erroneousness of Marxian theory of the state

Thirdly, the Bolshevists, if they were sincere in their professions, misunderstood the nature of the state. The state is but a body of people. The more intelligent the individuals who compose a state, the more energetic and enterprising, the more highly developed their moral character and social capacity, the more competent will their state be, the more capable of rendering great services to its members. Without doubt, a successful co-operative commonwealth would be a delightful state in which to live, perhaps the happiest that men can hope to contrive on earth. But such a state makes the greatest demands upon the capacities of its people. It cannot be organized by an undisciplined and disorderly crowd. It requires the finest beings which mankind can produce. Russia did not possess that kind of people in sufficient abundance. There was too much ignorance, stupidity, sloth, and selfishness. Such peoples may operate militarist and capitalist and perhaps even proletarian states, but they cannot operate a co-operative commonwealth. Had the communist leaders been philosopher-kings, made of the mettle demanded by

Plato for the operation of his ideal commonwealth, they might by a magnificent fiction, as Plato suggested, have established their authority over the Russian masses. But that would not have been a co-operative commonwealth. Perhaps some of the Bolshevists were made of such mettle. Perhaps even the whole Marxian dogma was designed to be a magnificent fiction. More probably not. The vision of the co-operative commonwealth faded into the reality of arbitrary Soviet rule.

4. Inadequacy of the theory of the class struggle

The Russian Bolshevists failed as idealistic statesmen, but they succeeded as realistic politicians. Politics is a practical art, concerned with securing what is possible for the individual and the members of his group. The broader the group and the more intimate its contacts with other groups, the less crudely selfish the art of politics becomes. But fundamentally it is a form of struggle between individuals and groups of individuals. The struggle of classes is but one phase of the general struggle in which the individual is involved, not merely as an individual but also as a member of many different groups and classes. The final error of the Bolshevists lay in oversimplifying the struggle of classes, in dividing the mass of struggling humanity into only two parts, the proletariat and its oppressors. Their experience in practical politics eventually convinced them that the class struggle is not so simple. They discovered that the individual wage earner in the modern state cannot be held to a course of political action based on indifference to all his contacts with his fellowmen, except that arising out of the contract of employment in capitalistic industry. The necessity of adjusting the conflicts of interest arising out of all his various contacts makes it impossible for the practical politician to concentrate on the relations between capital and labor alone. By such concentration he would become merely an employment manager or labor leader.

The politician must have wider interests. He has not only economic, but also sectional and social and racial and religious, groups to deal with. His is the most complex and intricate of all the practical arts. Having made this discovery, the Russian Bolshevists concentrated on what must be the first business of the practical politician, to hold power. Though sacrificing their vision of the co-operative commonwealth, they contrived to maintain their sway.

Triumph of realism in Russian Communist politics

3

Revolutionary communism failed in Russia after the fall of Nicholas II more convincingly than in France after the fall of Louis Napoleon. Indeed, it has never gained power except in times of confusion following the collapse of discredited authority and the destruction of established habits of obedience. But while communism, regarded as the organized political movement of the wage-earning class, has not yet shown the vitality of nationalism in modern politics, class consciousness remains one of the powerful forces in the determination of political conduct.

The persistence of class consciousness

Class consciousness, as a factor in modern politics, however, is not the clean-cut expression of corporate sentiment on the part of a definite body of persons which the Marxian socialists anticipated. At bottom it reflects the general but rather vague antipathy of the poor for the rich, that exists wherever wealth is in the hands of persons who are not the natural leaders of the community. The Bible states the chances of the rich entering the Kingdom of Heaven in language which is familiar to the poor. Recognition of this feeling sometimes appears in quarters where one does not ordinarily expect to find it expressed. Pope Leo XIII, for instance, began his important Encyclical on the Condition of Labor, published in 1891, wherein he sounded the keynote in the Catholic anti-

The class consciousness of the poor

socialist campaign, with the proposition that "a small number of very rich men have been able to lay upon the teeming masses of the laboring poor a yoke that is little better than slavery." The Roman Catholic Church and all Christian churches seek to abate, not to incite, social antipathies; but feeling against the rich is probably widespread, if not very intense, in normal times, and in times of economic stress may easily become deep and bitter. Dislike, even hatred, of the rich, however, is a fragile bond of union between individuals who have nothing else in common. If this were not so, all democratic states would be constantly inflicting injustice upon the rich, since the latter are such a small portion of the whole body of people. In the United States well-being is popularly supposed to be widely diffused; yet, acording to the estimate of the National Bureau of Economic Research for the year 1918,[1] only about two and one-quarter per cent of the people with incomes received incomes of more than $5000, eighty-six per cent received less than $2000, and the majority received less than $1200. If the class consciousness of the masses of the poor craved organized expression in American politics, socialist and communist propaganda would have found a warmer welcome.

The class consciousness of the "interests"

Class consciousness is most significant in practical politics when it springs from the consciousness of common interests on the part of much more coherent and articulate classes of persons than the whole mass of the poor. While the average, or, more strictly speaking, what the statisticians call the median, man in the United States received in 1918 about $1140, a quarter of the whole number received under $833, and another quarter received between $1140 and $1574. Both these groups may perhaps be properly included in the general mass of the poor, but they would by no means have the same interest in plunder-

[1] *Income in the United States,* Table 26.

ing the rich. An equal division of income all around, if such an operation were possible, would mean comparatively little to the higher of the two groups, even assuming that it were accomplished without producing any injurious effects upon the community as a whole. To the bulk of the people with low or moderate incomes, the amount of fellow feeling springing from the knowledge of their common lot is of small account in comparison with the bond of sympathy which arises from association in the same industry or trade, and in the same occupation or calling. Farmers, miners, railroad workers, trainmen, shopmen, mill workers, factory hands, clerical labor, skilled manual labor, unskilled labor, machinists, cigar makers, building-trades workers, wholesalers and jobbers, retailers, great merchants, small merchants, dry-goods merchants, grocers, fruit peddlers: these are classes whose members' relations are intimate enough and whose consciousness of kind is strong enough to furnish a working basis for organized political action. There is much reference to "the interests" in politics. Broadly speaking, there is nothing in politics except "interests." Politics is not merely the struggle of rival office-seekers for the spoils of victory; it is the conflict of "interests" of all kinds and degrees. The business of the statesman is much more than the simple vindication of right against wrong. It is above all the adjustment of these conflicting interests so that the whole body of people may survive.

The two forms of class consciousness

Class consciousness, therefore, tends to take two distinct forms in democratic states. In its more specific form it produces various interest-groups in popular elections and in representative bodies, the farmer vote leading to farm blocs, the business vote leading to corporation blocs, the labor union vote leading to union-labor blocs, etc. This aspect of class consciousness is of the greatest importance in the organization of political parties and the functioning

1. Specific "interests"

2. The general demand for equality

of partisanship in modern politics. In its more general form class consciousness produces the demand for equality which is so insistent in modern democratic states. Equality is one of those general political terms about which many controversies have raged. A strict construction of the term is obviously absurd. Men are not equal in size, general appearance, or personal charm, in physical strength, intelligence, or moral character. In what respects, then, are they equal?

Theological interpretations of the idea of equality

One source of the idea of equality is the Bible. The scriptural account of the creation reveals the original equality of man. "When Adam delved and Eve span, who was then the gentleman?" is a query which has occurred to many an honest but troubled Christian through the ages since the Scriptures were translated into the vulgar tongues. Several Christian churches, like the Quakers, have found in the Scriptures authority for the most democratic practices in church affairs and in affairs of state as well. Generally, however, the scriptural idea of equality has been developed along other-worldly lines. The authentic interpretation of scriptural equality by the Roman Catholic Church was stated by Pope Pius X in an Apostolic Letter to the Bishops of Italy on Catholic social action.[1] Human society, he affirmed, as established by God, is composed of unequal elements, just as the different parts of the human body are unequal; to make them all equal is impossible, and would mean the destruction of human society itself. The equality existing among the various social members, the Apostolic Letter continues, consists only in this: that all men have their origin in God the Creator, have been redeemed by Jesus Christ, and are to be judged and rewarded or punished by God, exactly according to their merits or demerits. Hence it follows

[1] Printed in Ryan and Husslein, *The Church and Labor,* New York, 1920.

that there are in human society, according to the ordinance of God, princes and subjects, masters and proletarians, rich and poor, learned and ignorant, nobles and plebeians, all of whom, united in the bonds of love, are to help one another to attain their last end in Heaven, and their material and moral welfare here on earth. Such a doctrine might make for equality before the laws of the church among its members, but was not incompatible with the most glaring inequality among the members of states. Equality of opportunity to gain admittance to Heaven might be preserved, but there was little security for the common man against special privilege on earth.

Ecclesiastical indifference to political equality

Theological interpretations of the idea of equality, when carried into the sphere of politics, have frequently led to a recognition of political equality on the part of adherents to a particular creed or members of a particular church, but more rarely to a recognition of the political equality of all men. The dogmatic churchman, at least in the periods when the relations between church and state have been the subject of controversy, has been prone to deny the political equality of his adherents and their opponents. Catholics oppressed Protestants in Catholic states, Protestants oppressed Catholics when the tables were turned. The Puritans, who fled their native land to found a church-state of their own, cast out the Baptists and Quakers who challenged their special privileges in their new world. When eventually the patriots of the American Revolution, having won their independence, adopted a federal constitution without any mention of God, rigidly conscientious sects like the Pennsylvania Covenanters refused to have any part in so profane an enterprise. They would not admit the equality of men who could organize a state without formally acknowledging their gratitude for divine aid.

Nationalistic ideas of equality have often been as limited

Nationalistic ideas of equality

as those of religious sects. More than one national group, having conquered political power, to borrow a socialist phrase, has established its language, literature, and culture in the halls of legislation and of justice, in the schools, and as far as possible in the homes of the people of the state, regardless of linguistic and cultural differences. The dominant national group has become a politically privileged group. When the triumph of nationalism was formally recognized at the close of the Great War, the authors of the new map of Europe were not blind to the dangers of uncontrolled national sentiment. An effort was made to safeguard the equality of minor national groups in states which a major group was destined to dominate. But toleration of differences in nationality is nearly as difficult to establish as toleration of differences in religion. The Czechs were intolerant of Germans in Bohemia, the Rumanians of Magyars in Transylvania, the Poles of Ruthenians in Eastern Galicia. In general, nationalist intolerance among the peoples of Europe has interfered with recognition of the equality of all the members of national states, and obstructed the return of peace and prosperity.

Nationalistic indifference to political equality

In the United States the mingling of a multitude of peoples has blurred the minor national distinctions, but the major destinctions stand out more sharply than in Europe. The same Peace Conference that discountenanced, if it did not altogether prevent, nationalist discriminations in Europe, rejected, at the instance of the Americans, the Japanese plea for an explicit acknowledgment of racial equality. In the United States opinion has always been divided with respect to the equality of races. Stephen A. Douglas, the ablest of the cruder sort of American nationalists, once voiced an idea of equality which often satisfies the sentiment of nationality. He was defending his professed indifference to the servitude of

the negro in America. "No man can vindicate the character, motives, and conduct of the signers of the Declaration of Independence," he asserted, "except upon the hypothesis that they referred to the white race alone, and not to the African, when they declared all men have been created equal; that they were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain."[1] In his view not all men, but only all men of British birth or extraction, were created equal. While Douglas would have extended this idea of equality to include all Europeans, there he would probably have stopped. This is the intolerant nationalist idea of equality.

The socialist idea of equality

The socialist idea of equality has its limitations also, but they are of a different sort. Socialists cannot logically recognize nationalist or racial differences as grounds for discrimination, without denying their primary allegiance to the international proletariat. Although the problem of Asiatic immigration into the United States has embarrassed American socialists, on account of the potential competition of cheap Asiatic labor with that of the European immigrants from whom socialism in America derives much of its support, none of the Internationals has countenanced a policy of special privileges for favored nations or races. Socialists, consistently with their materialistic philosophy, are primarily concerned with the distribution of wealth and income. A co-operative commonwealth does not necessarily mean an equal division of the material goods of life, but rather a division in accordance with individual needs, regardless of differences in productive capacity and actual contributions to the common stock. But the inequalities in the distribution of wealth and income which exist in the modern competitive capitalistic state the socialist is bound to condemn. His idea of

[1] Speech at Springfield, Illinois, June 12, 1857.

equality accordingly tends to become that of an equal, or at least more nearly equal, division of income. More broadly speaking, socialist equality means economic equality. Economic equality can be attained, he thinks, only by the formation of the proletariat into a class, the overthrow of the bourgeois supremacy, and the conquest of political power by the proletariat. Socialist equality, therefore, comes to mean political equality for proletarians but not for capitalists, that is, the erection of the proletariat into a privileged class. But this view is no less defective than that of intolerant nationalism or intolerant clericalism.

Socialistic indifference to political equality

The American idea of equality is neither other-worldly nor intolerant. It originated in the speculations of the pagan philosophers of classical antiquity, the Epicureans and above all the Stoics, and was definitely formulated by English political writers of the seventeenth century.

The American idea of equality

The first to make the idea the cornerstone of his theory of the state was the rationalistic philosopher and defender of absolute monarchy, Thomas Hobbes. In his *Leviathan,* written to support the pretensions of the House of Stuart to the British throne during the Civil War, he argued that the state was a body of people who were by nature one another's equals. This natural equality was a relative rather than an absolute equality. Men differed more or less in strength, intelligence, social capacity, and otherwise, but no man was so much stronger, shrewder, or more cunning than his rivals as to be above fear of them in the struggle for existence, or so much weaker as to be incapable of injuring them. Natural inequalities existed, but were negligible in comparison with the total equipment of men in capacities for survival and the enjoyment of life. The proof, he alleged, of the natural equality of man was the fact that no man, however much he might covet his neighbor's goods, or his neighbor's power, or his reputa-

Hobbes's view

tion, ever wished to be anybody but himself. Upon this idea of natural equality he built up his whole theory of the state, of justice and liberty, and of law and government. Hobbes's theory, however, was designed to support a form of government which found no favor with the partisans of the Puritan Commonwealth or of the subsequent English Revolution of 1688, and it was from the latter sources that the political ideas of the American Revolutionists were largely derived.

Locke's view

The principle apologist for the Revolution of 1688 was the rationalistic philosopher and defender of limited monarchy, John Locke. Locke, like Hobbes, made the idea of equality the basis of his theory of the state, but he gave it a new interpretation. The natural equality of men, declared Locke, consists in "the equal right which every man has to his natural freedom without being subject to the will and authority of any other man." What Locke meant by natural freedom is a question which must be reserved for consideration in a later chapter. It is evident at least that the idea of equality did not preclude the recognition of whatever differences between men, except with respect to their rights, might actually be found to exist. Equality meant equality of rights, regardless of inequalities of capacity or condition or of differences of religion, nationality, or class.

Jefferson's view

Jefferson, who wrote the belief in equality into the Declaration of Independence, expressly stated his high opinion of the authority of Locke in matters of political theory.[1] Presumably he shared Locke's idea of equality. In a letter to General Washington, written in 1784, he stated that the foundation on which the State constitutions were built was "the natural equality of man, the denial of every pre-eminence but that annexed to legal

[1] See letters to T. M. Randolph and J. Norwell, *Works*, Ford's edit., Vol. III, p. 145, and Vol. V, p. 90.

office, and particularly the denial of a pre-eminence by birth."[1] Years later (1816) he wrote to another correspondent: "The true foundation of republican government is the equal right of every citizen in his person and property, and in their management."[2] In Jefferson's mind the important aspect of the idea of equality was the denial of the claims of any person or class to specially privileged treatment under the laws of the state. Such claims were not denied on the ground of any physical, mental, or moral equality. On the contrary, the dogma of equal rights was derived from the general principles of justice and liberty.

The French Declaration of Rights

The revolutionary idea of equality was expressed more precisely in the French Declaration of Rights of 1789. Article I of that famous document declares that "men are born and remain free and equal in rights. Social distinctions can only be founded on common utility." But such a definition of equality deprives it of independent significance. Without knowing the revolutionary ideas of liberty and justice, one cannot tell what are the rights with respect to which all are equal. One cannot tell, for example, whether it means that all, being created equal, should share alike in the distribution of opportunities of every kind, regardless of unequal capacities or conduct; or merely that no one should receive more favored treatment under the laws of the state than his services to his fellowmen might justify. But it is clear, at least, that according to these theories the state exists to serve all the people and not the members of a single class alone, be it an hereditary nobility, a dominant race or national group, a favored religious sect, a capitalist bourgeoisie, or a wage-earning proletariat.

Lincoln's view

The American idea of equality, even when stated in the simpler form of equal rights, leaves many difficult

[1] Jefferson's *Works*, Vol. III, p. 466.
[2] *Ibid.*, Vol. X, p. 39.

problems of interpretation unanswered. It would be a bold man surely who would assert that the policy of the United States has always or indeed ever wholly squared with the Jeffersonian idea. The American who has given the most thought to the true meaning of the idea of equality is Abraham Lincoln. In one of his great speeches on the slavery question he stated his own idea of equality as follows: "I think that the authors of that notable instrument [the Declaration of Independence] intended to include all men, but that they did not intend to declare all men equal in all respects. They did not mean to say that all were equal in color, size, intellect, moral development, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal—equal in certain inalienable rights, among which are life, liberty, and the pursuit of happiness. This they said and this they meant. They did not mean to assert the obvious untruth, that all men were then actually enjoying that equality, nor yet that they were about to confer it upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society which should be familiar to all and revered by all—constantly looked to, constantly labored for, and even, though never perfectly attained, constantly approximated; and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people, of all colors, everywhere."[1]

Equality a juristic ideal

Such is the evolution of the American principle of equality. From an idea that all men are equally free in a state of nature, it has changed to an ideal of equal justice in a perfected civil state. It is a juristic ideal, which must be interpreted in the light of the theory of

[1] Lincoln, Speech at Springfield, June 26, 1857.

justice of which it forms a part. Since Lincoln's time progress toward the realization of his ideal has been more rapid probably than he ever dared to hope. Not only in the United States, but also in other important states, no person may now be denied the equal protection of the laws without a breach of the fundamental law of the land. All are equal, as people say, in the eyes of the law. By a legal fiction it may even be said that all men are created equal. Such a fiction, like that of absolute sovereignty in the juristic theory of the state, if its limitations are rightly understood, may be a convenience in the administration of justice. It also illuminates the character of the state itself.

4

Significance of the ideal of equality in the classification of states

The fiction of equality cannot be kept alive except by a people who intend that their state shall serve the common purposes of all its members. It is only such a people who can form a modern commonwealth. The modern commonwealth might theoretically be an ecclesiastical as well as a civil commonwealth, if all its people were members of the same church. Otherwise, there must be a separation of church and state and generous toleration of religious differences, in order that the state be a commonwealth. It might theoretically be also a nationalistic commonwealth, if all its people were bound together by the same sentiment of nationality. Otherwise, there must be generous toleration of nationalistic differences among its people, in order that the state be a commonwealth. It might theoretically be even a proletarian commonwealth, if all its people were members of that particular class. Otherwise, there must be generous toleration of class differences among its people, in order that the state be a commonwealth. The explanation in all these cases is the same; namely, that the character of the commonwealth results from its response to purposes which may be pursued in common by all its

members. The Marxian dogma that there can be no commonwealth except a proletarian commonwealth is as erroneous as the dogmas that there can be no commonwealth except the ecclesiastical or the nationalistic.

Relation of economic interests to politics

The struggle of classes is only one form of the contention within the state which results from the conflicts of interest among its people. Each member of the state has various special interests and appropriate points of view, and is more or less conscious of his community of interest with others of the same kind. Instinctively or by reason of his special interests, each tends to flock together with others whose interests are similar. The rulers of states consequently have to deal, not only with the individuals who are its members, but also with the groups into which those individuals are more or less definitely herded. They must adjust not only the conflicts of individual interests of many different kinds, but also the numerous conflicting interests of different groups or herds. Marxian socialists and communists deem their material interests the most important, and are content to base their political action exclusively upon material considerations. Their herd is their economic class, and they identify their class with the proletariat. But history teaches that many men's herd has been determined primarily by non-economic interests, notably by religion and in recent times by culture. The economic determinist may be persuaded that religious and cultural groups reflect in the last analysis differences in underlying economic conditions, but politicians and statesmen are chiefly concerned with the direct and immediate causes of human conduct. In the sphere of politics there is no such creature as the economic man, of whom political economists and Marxians are fond of writing. The politician must deal with actual men, not with logical abstractions. Voters are men animated not only by the desire for wealth, but also by other desires and feelings. They

are men of this or that race and color as well as economic and social condition, of this or that creed and culture as well as class. Politicians do not know men merely as men or even as breadwinners: they know them also as Masons, Odd Fellows, or Knights of Columbus, as Rotarians, Elks, or I. W. W.'s, as members of the American Legion, the Grange, or the General Federation of Women's Clubs. Among the bonds of union in these various groups are the property interests and other economic considerations, which undoubtedly play a great part in the actual process of government. But precisely how economic interests are related to politics is a difficult question.

The true causes of faction and partisanship

The Marxian view that the relation between economics and politics is expressed in the doctrine of the struggle of the class-conscious proletariat for the conquest of political power pays too little heed to the variety of interests which cause men to act together in politics. James Madison was nearer the truth in his discussion of the causes of what he called faction, which appears in the tenth number of *The Federalist*. By a faction he meant "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." "The latent causes of faction," he wrote, "are sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points . . .; an attachment to different leaders ambitiously contending for preeminence and power; . . . have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress

each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that, where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts." The variety of interests in politics Madison recognized to be very great, but those which are economic in nature he believed to be the most important. This appears plainly enough as he proceeds with his analysis of the causes of faction. "But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."

Psychological versus economic basis of politics

The importance of the connection between economic interests and political action has led many political thinkers besides the Marxians to adopt an economic interpretation of politics. Among modern political scientists of this way of thinking one of the most conspicuous is Dr. Charles A. Beard. With a wealth of learning he has demonstrated the intimacy of that connection. In his weighty little book entitled *The Economic Basis of Politics,* he cites Madison as one of his principal authorities. But he does not make clear whether economic interests are the basis of politics or merely one of the bases of politics. Madison himself was more definite. The latent causes

of faction, he asserted, are sown in the nature of man. He put the psychological interpretation of politics before the economic. But among the springs of political action economic interests were, he believed, the most common and durable. It would be better to conclude, as Madison does, not that the economic interests of men are the basis of politics, but rather that "the regulation of these various and interfering interests forms the principal task of modern legislation."

Rejection of false foundations by the "Founding Fathers"

In forming a "more perfect Union," therefore, the "Founding Fathers" were mindful of the special interests which were known to exist among the people of the United States. They were tolerant of differences in religion, culture, and economic and social condition. They insisted that their commonwealth should serve only those interests which all the people might equally share. The foundations of their commonwealth consisted of the purposes which they declared in the Preamble to the Constitution. First they reaffirmed their purpose to found a commonwealth, for that is what they meant by forming a more perfect Union. Next they declared their purpose to establish justice. This is the first matter to be considered in any investigation of the purposes which constitute the true foundations of the modern commonwealth. It is the very essence of that process of adjustment of the conflicts of interest—religious, cultural, social, and economic—which forms the principal task, not only of modern legislation, but of all the operations of government in the modern commonwealth.

NOTES ON BOOKS

1. There have been many editions of the *Communist Manifesto* (1848). The authorized English translation, edited by F. Engels, is the best. It may be found in R. W. Postgate's *Revolution* 1789-1906 (1920). All three volumes of Marx's *Capital*

have been translated into English (1887). Engels, the editor, referring to the saying that the work was "the Bible of the Working Class," declared that it was an "adequate expression of its condition and of its aspirations." The extent to which this has been true can be judged from T. Kirkup's *History of Socialism* (1900), which is on the whole the most dispassionate and instructive account of the subject in English to the date of publication. For criticisms of the Marxian political philosophy, see E. R. A. Seligman's *Economic Interpretation of History* (1903), O. D. Skelton's *Socialism, A Critical Analysis* (1911), and Hillquit and Ryan's *Socialism: Promise or Menace?* (1914).

2. R. C. K. Ensor's *Modern Socialism* (2d ed., 1907) is a convenient introduction to the political policy of the Second International. E. Vandervelde's *Collectivism and Industrial Revolution* (translated by C. H. Kerr, 1901) is perhaps the clearest and most authoritative explanation in English of the evolutionary socialism which was tending to prevail on the Continent of Europe before the Great War. J. R. MacDonald's *The Socialist Movement* (Home University Library) is the best account of the moderate socialism which tends to dominate the British labor movement in its political activities. M. Hillquit's *History of Socialism in the United States* (5th ed., 1910) shows the relative influence of the "revolutionary" and "evolutionary" socialist movements in the United States. The policy of the Russian Communists and of the Third International is most clearly explained in B. Russell's *The Practice and Theory of Bolshevism* (1920), R. W. Postgate's *The Workers' International* (1920), and H. N. Brailsford's *The Russian Workers' Republic* (1921). For recent developments in the political ideas of British labor see G. D. H. Cole's *The World of Labour* (4th ed., with new introduction, 1919), A. H. Gleason's *What the Workers Want: A Study of British Labor* (1920), and N. Carpenter's *Guild Socialism: An Historical and Critical Analysis* (1922).

3. The most comprehensive recent discussion of political equality in theory and practice is Viscount Bryce's *Modern Democracies* (2 vols., 1921). See especially Part I, Chapter vii, and Part III, Chapters lxxiii-lxxx. No discussions of political equality in any modern state are more illuminating than those by De Tocqueville in his *Democracy in America* (2 vols., Bowen's ed., 1862), and by Bryce in *The American Commonwealth* (revised ed., 1910). C. Becker's *The Declaration of Independence* (1922)

discusses authoritatively the origin and influence of the American idea of equality. C. E. Merriam's *History of American Political Theories* (1903) still contains the best brief account of the progress of democratic ideas in the United States. See also H. J. Ford's *Rise and Growth of American Politics* (1898), J. A. Smith's *The Spirit of American Government* (1907), and H. Croly's *The Promise of American Life* (1909) and *Progressive Democracy* (1914).

CHAPTER VI

JUSTICE

1

The true foundations of states and of the modern commonwealth

THE true foundations of the state consist of the natural instincts, casual impulses, and rational interests, which induce men to demand leadership, or at least to submit to the authority of rulers. But the relative influence of these various factors varies greatly in different kinds of states. In backward states impulse and instinct play a comparatively large part in determining the conduct of peoples. The more energetic, enterprising, and masterful men impose their authority by force and by craft upon the inert masses. Authority once established is re-enforced by the habitual deference of those accustomed to obey, and may endure long after it has passed into the hands of men greatly inferior to the original rulers of the state. But the modern commonwealth is less dependent upon impulse and instinct for its existence. Its foundations consist in larger measure of the rational interests by which a body of people may be united in an organization of the kind called political. In some states the authority of the rulers is profoundly affected by powerful corporate sentiments, springing from the various religious, racial, cultural, economic, and social interests of the people. If the body of people which is bound together by such corporate sentiments is substantially the same as that which constitutes the state, these sentimental ties will enhance the stability of the state, and need not impair its character as a commonwealth. In modern times they frequently have had a contrary effect, because a commonwealth cannot rest on

sentiments which not all its people may share. The rational interests which support commonwealths must be such as can be shared by all its members, regardless of creed, race, culture, or class. Such interests cannot be the exclusive possession of any special or privileged group within the state, whatever be its character. They must be public interests. The foremost of these is a people's interest in justice.

What is justice?

What, then, is justice, this first affair of state? It is commonly said to mean that each shall receive his due. It implies a sense of right on the part of the beneficiary, and of obligation on the part of the giver. No normal man denies the obligation. Nevertheless, the greatest differences of opinion exist concerning its nature. What justice is and how it shall be established are questions which have always caused the bitterest strife, and still remain uppermost in the minds of the masses of men.

The Golden Rule

The best known and most revered rule of justice in Christian countries is called the Golden Rule. This rule seems so clear, so forceful, and so easy that for the private guidance of the individual it is the most useful rule of justice in the world. No rational man disputes its wisdom. Yet it is singularly inadequate as a public guide to conduct in any organized body of people. The significance of any rule lies in its application. Now the Golden Rule makes each individual the judge of his own rights as well as of his duties to others. When it is reduced to practice, on account of the differences in the natures and conditions of men and their resulting differences of opinion, instead of one common rule, accepted by all as the standard of right and wrong, there are as many different rules as individuals. The body of people as a whole has in effect no fixed rule, received by general consent and employed as the common measure to decide all controversies between its members. Hence, though all civilized governments profess to admin-

ister justice, nowhere is the attempt made to dispense justice on the basis of the Golden Rule. This may properly be the ideal of Christians, but it cannot be the practice of statesmen.

Legal justice

Justice, as the term is used in modern politics, has come to have two different meanings: First, it means the rules of conduct which are actually enforced in any political community by authority of its established rulers. Such rules of conduct may be termed civil laws, to distinguish them from ecclesiastical or moral or natural or divine laws. Their sanction is the will of the sovereign, if we mean by sovereign that agency of authority in the community which is itself beyond the power of the law, that is, which is legally capable of amending or repealing it. Might makes right. Justice and legality become interchangeable terms. Secondly, justice may mean, not the rules of conduct actually enforced in a community, but those which ought to be enforced. In this sense of the term, justice is not a reality but an ideal. Political justice, as distinguished from legal justice, is the ideal of the relations which should exist between the members of the state. It is not necessarily identical with law, nor with morality, nor with anything that is actually enforced or generally observed. It does not necessarily express the will of anybody in particular, but rather the feelings and aspirations of the people in general. Its ultimate sanction is not any visible authority, but the invisible power of right reason or conscience. Political justice is not the product of force. Might does not make right, but, on the contrary, the people of a commonwealth would say that right ought to make might.

Political justice

The two meanings of justice serve very different ends in politics. Legal justice emanates from the established rulers. It is invoked in the name of peace and order. It tends to preserve the *status quo*. It is the palladium of

vested interests, the instrument of conservatism. Political justice, on the other hand, is the instrument of the forces of change. It repudiates the claim of dominant interests to become vested rights. It challenges the old order, and subordinates stability to progress. It reflects the point of view, not of rulers, but of the ruled. In a well-ordered state many men, even in an ill-ordered state some men, are satisfied with legality. Others will not rest until either the law is felt to be just, or their ideal of justice becomes the law. It may not be necessary to justify the law to all men; but in a commonwealth at least it should be possible.

2

The Sophist's theory of justice

Efforts to justify the law are as old as law itself. An ancient and widely held justification is that put by Socrates into the mouth of the Sophist and recorded by Plato in the first book of the *Republic*. "We both admit," Socrates is reported to have said, "that justice is in harmony with interest; but you lengthen this into the assertion that justice is the interest of the stronger." Elaborating the theory his adversary had queried: "Have you never heard that forms of government differ, that there are tyrannies, and democracies, and aristocracies? . . . And the rulers in each state make laws democratical, aristocratical, or tyrannical, with a view to their several interests; and these laws, which are made by them for their own interests, are the justice which they deliver to their subjects, and him who transgresses them they punish as a breaker of the law and unjust. And that is what I mean when I say that in all states there is the same principle of justice, which is the interest of the rulers; and as the rulers must be supposed to have power, the only reasonable conclusion is, that everywhere there is one principle of justice, which is the interest of the stronger." And again he ridiculed Socrates, because the latter had exposed himself to the

Might makes right

charge that he believed that the shepherd tended the sheep with a view to the good of the sheep and not to the good of the shepherd or his master, and that the rulers of states did not think of their subjects as sheep and were not ever studying how best to promote their own advantage at the expense of their subjects. Socrates routed the Sophist by a dialectic *tour-de-force* of the kind that has made his dialogues famous, but the opinion of the Sophist has been renewed in modern times and sustained by arguments more cogent than any with which Socrates had to deal.

The justification of political authority

In modern states, however, no respectable rulers claim a right to use their power deliberately and exclusively for the promotion of their own personal interests, regardless of those of others. Since Frederick the Second of Prussia popularized the doctrine that the king is the first servant of the state, the distinction between a state and an estate has been at least outwardly respected. Those who continue to hold that might makes right seek to justify the law by justifying the authority that makes the law. If they can justify a political authority which is absolute, its commands must be just, however injurious they may appear to those who are required to obey.

1. The theory of the divine right of kings

This was done to the satisfaction of many people by means of the dogma of divine right. The way of thinking which made the dogma of divine right so great a force in modern history is best illustrated by the quaint treatise of the pedantic King James the First of England, published for the edification of his dutiful subjects under the title, "The True Law of Free Monarchies."[1] In support of his views King James naïvely cited the instance of the ancient Hebrews in the time of their commonwealth, who, tiring of the rule of their judges, prayed for a king, "that

[1] Reprinted in Charles H. McIlwain, *The Political Works of King James the First,* Cambridge, 1917.

we also may be like all the nations; and that our king may judge us, and go out before us, and fight our battles." They received what they had prayed for.[1] What God had done once, James thought He could do again, and had done, he believed, in his own case. At the beginning of the seventeenth century most loyal subjects shared this belief that monarchy was a divinely ordained institution, that hereditary right to rule was indefeasible, and that kings were accountable to God alone. Though kings might seem to abuse their power, in order to advance their private interests at the expense of those of their subjects, such oppression was not injustice. It was a form of trial which Christian subjects, for the good of their souls, would bear with patience and fortitude. Non-resistance and passive obedience were regarded not merely as part of the duty of loyal subjects but also as manifestations of the humility which is enjoined upon all faithful Christians. Moreover, what seemed to a subject an abuse of power by his sovereign, might be no more than just punishment for his sins, or even calculated in the end to promote his true happiness. After all, not he, but God, was the judge of such things.

2. Filmer's theory of the natural power of kings

Sir Robert Filmer, an ingenious writer, who is remembered to-day less for what he wrote himself than for what greater men like Sidney and Locke wrote in reply,[2] gave this theological doctrine a more philosophical turn. Since God is the author of nature, he argued, whatever is natural has His sanction. Now the first kings, he asserted, were the fathers of families. Since the authority of the patriarchs was natural, that of the heads of modern states is also. Kingship, therefore, being natural to men, exists by

[1] I Samuel VIII: 19-20.

[2] Algernon Sidney's book cost him his life under the despotism of the later Stuarts. John Locke's *The First Treatise of Government,* was designed to clear the ground for his *Second Treatise of Government,* the semi-official justification of the English Revolution of 1688 and the foundation of the political theory of the American Revolution.

divine right. The king's justice thus obtains the same authority as divine revelation in any other form, and political loyalty becomes a religious duty. Such was the argument for absolute monarchy set forth in Filmer's book *The Patriarcha,* first published at London in 1680. This doctrine supplied an adequate basis for law and order in any state where king and people were of the same religion. Where they adhered to different religions, it was likely in practice to be inadequate. It is evident why kings were once so eager to maintain religious conformity. Hence the maxim consecrated by the Peace of Westphalia in 1648 for the states of the Holy Roman Empire, *cuius regio, eius religio.* It is also evident that the kings of states where religious conformity could not be maintained needed a purely rational justification of their authority.

3. Hobbes's theory of the rational power of kings

The first notable attempt to do this for the rulers of England was that of Thomas Hobbes, whose *Leviathan* appeared in 1651. Hobbes's ideas, indeed, were not new. They may be traced back even to the Sophists of whom Socrates spoke with such contempt. The Sophists said, according to the report in the second book of Plato's *Republic,* that "to do injustice is, by nature, good; to suffer injustice, evil; but that the evil is greater than the good. And so when men have both done and suffered injustice and have had experience of both, not being able to avoid the one and obtain the other, they think they had better agree among themselves to have neither; hence there arise laws and mutual covenants; and that which is ordained by law is termed by them lawful and just. This they affirm to be the origin and nature of justice: it is a mean or compromise between the best of all, which is to do injustice and not be punished, and the worst of all, which is to suffer injustice without the power of retaliation; and justice, being at a middle point between the two, is tolerated not as a good, but as the lesser evil, and honored

by reason of the inability of men to do injustice. For no man who is worthy to be called a man would ever submit to such an agreement if he were able to resist." Thus early we find the distinction made between what may be called natural justice and conventional justice. The former, which the Sophists thought men would like to have if they dared, is the rule of conduct so picturesquely described by Wordsworth as

Natural justice

> The good old rule . . . the simple plan
> That they should take who have the power
> And they should keep who can.

Conventional justice

Conventional or political justice is what man chooses to have, as the Sophists were reputed to believe, "not willingly, or because he thinks that justice is any good to him individually, but of necessity, for wherever anyone thinks that he can safely be unjust, there he is unjust. For all men believe in their hearts that injustice is far more profitable to the individual than justice."

The state of nature

Such a view implies a low opinion of man in his natural state. Hobbes, like the ancient Sophists, held such an opinion. Man, he declared, is naturally a sensual, selfish creature, and life in a state of nature is "solitary, poor, nasty, brutish, and short." Believing this, and fearing also the insecurity of life and property among an unorganized mass of such men, no matter how strong or cunning any one of them might be, they one and all would agree in preferring conventional to natural justice. This they could secure, he argued, only by setting up some man or body of men whose word should be law for the others.

The social compact

The process of setting up such a lawgiver or sovereign was called by Hobbes the social compact or contract, and logically, if not historically, he argued, the foundation of all political authority and of every state must be such a contract. The test of statehood is the existence of a

sovereign. Hobbes himself preferred the sovereignty of a single person to that of any greater number. His reasons for his preference for monarchy over any other form of government he explained logically enough upon his principles, but the important point is his insistence that the rule, whether of one or many, shall be absolute.

The doctrine of absolute sovereignty

Hobbes elaborated and refined his theory of absolutism with a subtlety and ingenuity that puts him far ahead of the ancient Sophists. Unless the authority of the ruler or sovereign is absolute, he urged, no man can be sure of gaining the advantages of conventional justice; for, though he may obey the law when disobedience might be more profitable to him, he cannot be sure that others will do likewise. It will not pay him to obey unless he can rely upon the power of the sovereign to enforce obedience from others. The sovereign himself, therefore, must be above the law, that is, not himself a party to the agreement or compact. Thus Hobbes reaches the conclusion that sovereignty is unlimited, indefeasible, impeccable, irresponsible, and irrevocable. It is also indivisible and inalienable. This is all apparently that the most arbitrary despot could desire. Whoever obeys his will receives justice. Whatever he may require of any subject in order to promote his own interests or to preserve his own power is also just, because the preservation of his power is the foundation of justice for others.

De facto and de jure sovereignty

This abundant authority is held by the sovereign, however, on one condition: he must be able to keep the peace and protect his subjects. If he loses his power, whoever can acquire it is entitled, by as good a right as he ever had, to keep it, for the subject has no reason to obey anyone but the ruler who can muster force enough to command obedience from all. Hobbes's argument, therefore, tends to support the authority of what modern jurists call the *de facto* sovereign and to repudiate claims based upon any

other foundation. It supports the authority of those who actually have the power of a sovereign, whatever be the nature of their title to the power. Consequently, when in Hobbes's own time Oliver Cromwell succeeded in establishing his authority as Lord Protector of the British Commonwealth and the fugitive Prince Charles became merely the *de jure* sovereign, the House of Stuart had nothing to gain from such a doctrine and the royal exile sent its discredited author back across the channel in disgrace. Hobbes's doctrine, indeed, was never of much use in justifying the authority of tyrants. Those who seriously needed justification could not be helped by such a doctrine, and others had more reputable theories at their command. The time has now passed when any theories can serve the purposes of such rulers. Hobbes's doctrine, however, was revived by later generations in the interest of a different kind of authority, the sovereignty of parliaments and other representative bodies in states where the principle of majority rule is supposed to obtain.

4. Bentham's theory of the absolute sovereignty of parliaments

The man who did most to revive the rational justification of absolute power in modern states was Jeremy Bentham. Much philosophizing had been done during the century following the age of the Puritan Commonwealth. Numerous writers had taken the doctrine of the social compact, which Hobbes had made the keystone of his theory of sovereignty, and utilized it for their own purposes. Noteworthy among them were John Locke, who employed it in his justification of the English Revolution of 1688, and Rousseau, who employed it in his justification of the French Revolution, which, when he wrote, lay a whole generation in the future. The doctrine takes on strangely different forms in the hands of these two thinkers. But it was made to serve the same purpose: justification of disobedience to established authority, that is to say, denial of the necessary identity between law and

justice. Indeed, it also served that purpose, though unwittingly, at the hands of Hobbes, for, as we have seen, what he succeeded in justifying was not the authority of Charles, but that of Oliver. Nevertheless, the theory of an original agreement or social compact had encountered strong opposition. The science of anthropology was then in its infancy, but intelligent men already surmised what investigators like Sir Henry Maine were able a century later conclusively to prove, that ancient society was a complex thing, and that the roots of the modern state could not be found in the brutal natural state depicted by Hobbes or in the fantastic state of nature so charmingly portrayed by early eighteenth century philosophers and poets. The psychologists had made greater progress and by the masterly craft of a series of thinkers, notably Hume, were already able to show that future generations could not be bound by any original contract, for mankind would not be satisfied once for all time with a single act of justification, but would demand that the authority of rulers be justified by their works from day by day. So arose the principle of utility, otherwise known as the greatest happiness principle.

The greatest happiness principle

Bentham first applied this principle to the problem of sovereignty in his *Fragment on Government,* published in 1776. He stated the new principle most concisely when he wrote: "It is the greatest happiness of the greatest number that is the measure of right and wrong." Jeremy Bentham's illustrious successor, John Stuart Mill, stated it more elaborately in his famous essay on *Utilitarianism,* published in 1861. "The creed which accepts as the foundation of morals utility, or the greatest happiness principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the ab-

sence of pain; by unhappiness, pain and the privation of pleasure."

Utilitarian theory of political justice

This is not the place to examine the principle of utility with a view to determining its validity as a general guide to human conduct. We are concerned only with its application to the special relations which exist between rulers and those who are ruled. Bentham's definition of the state was based on the fact of that relationship. It furnished the foundation for a thoroughly realistic political theory. "When a number of persons are supposed to be in the habit of paying obedience to a person, or assemblage of persons, of a certain and known description, such persons altogether are said to be in a state of political society." He distinguished this state from the state of nature, not by any formal or implied convention or compact, but merely by the presence or absence of the habit of obedience. In fact, the distinction could not be clear, since the habit would never, he thought, be found either perfectly formed or entirely absent. In any real state, however, there can be no distinction such as Hobbes made between political justice and natural justice. Rulers and subjects alike will be guided by the same measure of right and wrong. Subjects will obey their rulers, as has been said before, as long as the probable mischiefs of obedience are less than the probable mischiefs of resistance. In other words, it is their duty to obey, if it is in their interest to do so, and not otherwise. The ruler is under the same obligations as his subjects, and no others. He may use his power to promote his own interests according to his own pleasure. But if he attempts to act in any way which is not in the interest of his subjects, he must not forget that they will be under no obligation to recognize his authority. To maintain his sway, according to Bentham, it would be necessary to use his power in accordance with the requirements of the principle of utility. Government,

therefore, like other kinds of human activity, should be judged by its tendency to promote "the greatest happiness of the greatest number."

Utilitarianism and democracy

Bentham had great confidence in human reasonableness. "Men," he wrote, "let them but once clearly understand one another, will not be long ere they agree." He seems to have supposed that the greatest happiness of the greatest number would tend to be substantially identical with the interests of the whole body of people composing the state, that no rational subject in a well-ordered state would fail to identify his own interest with that of the greatest number, and that no prudent ruler would act in a manner injurious to a majority of his subjects. Individuals who might be tempted to put their private interests before those of the greatest number would be constrained to comply with the dictates of the greatest happiness principle by the imposition of suitable penalties for their misconduct. The authority of the ruler, as long as it was exerted in a rational manner, that is, in accordance with the principle of utility, would be supported by the preponderance of force in the community, and all acts committed by such authority would be just. Thus the authority of the ruler would be no less absolute than that of the sovereign described in Hobbes's *Leviathan,* for it could be limited only by the limits to the force at his command or by his subjects' willingness to obey. Since the will of the sovereign is the source of law, subjects have no rights except those which the sovereign will respect. It cannot be said that by this theory either might makes right, or right makes might. Right is might, and might, right. If it be supposed that superior force is always on the side of the greatest number, then the right of the majority to rule is manifest. Thus the greatest happiness principle tended to serve the purposes of the advocates of democracy. Justice becomes iden-

tical with the law of the land, when it is a democratic land.

Identification of justice with the interests of the majority

The Utilitarians, as Bentham's followers came to be called, were sanguine men. They were also greatly discontented with the institutions and policies of England. Such men were bound to be radical reformers. They were, indeed, admirably equipped to serve an age which had much to gain by dispassionate criticism of an antiquated and unreformed government. But they were slow to appreciate the full implications of their theory of justice. Bentham himself never gave to his own political theories the same deliberate consideration which he devoted to those of his opponents. The task eventually fell to the lot of the most competent of his disciples, James Mill, who nearly half a century after the publication of the *Fragment on Government* contributed to the Encyclopedia Britannica an elaborate essay on government, in which the logical consequences of the utilitarian theory of politics were fully worked out. It became clear how utilitarianism tended to reconcile justice with legality by identifying it with the interests of the majority. That article attracted the notice of the great Whig historian, Macaulay, then a young man full of the overweening assurance of precocious youth. Of the youthful Macaulay, Lord Melbourne, the one time "boss" of the Whig party, was reported to have said: "I should like to be as sure of anything as Tom Macaulay is of everything." Macaulay was sure that the Utilitarians were a fraud and a humbug. He believed their knowledge of human nature was seriously defective, their knowledge of politics, both historical and practical, altogether wanting. When James Mill's essay appeared, he assailed it in a slashing article, filled with caustic sallies and flowing periods.

"How is it possible," he queried, "for any person who holds the doctrines of Mr. Mill to doubt that the rich,

Macaulay's attack on the utilitarian theory of justice

in a democracy such as that which he recommends, would be pillaged as unmercifully as under a Turkish Pacha? It is no doubt for the interest of the next generation, and it may be for the remote interest of the present generation, that property should be held sacred. And so no doubt it will be for the interest of the next Pacha, and even for that of the present Pacha, if he should hold office long, that the inhabitants of his Pachalik should be encouraged to accumulate wealth. Scarcely any despotic sovereign has plundered his subjects to a large extent without having reason before the end of his reign to regret it. Everybody knows how bitterly Louis the Fourteenth, towards the close of his life, lamented his former extravagance. If that magnificent prince had not expended millions on Marli and Versailles, and tens of millions on the aggrandizement of his grandson, he would not have been compelled at last to pay servile court to low-born money lenders, to humble himself before men on whom, in the days of his pride, he would not have vouchsafed to look, for the means of supporting even his own household. Examples to the same effect might easily be multiplied. But despots, we see, do plunder their subjects, though history and experience tell them that, by prematurely exacting the means of profusion, they are in fact devouring the seed corn from which the future harvest of revenue is to spring. Why, then, should we suppose that the People will be deterred from procuring immediate relief and enjoyment by the fear of distant calamities, of calamities which perhaps may not be fully felt till the times of their grandchildren?"[1]

Presently Macaulay answered his own question with one of his most magnificent pieces of declamation: "The civilized part of the world has now nothing to fear from

[1] Thomas B. Macaulay, "Mill's Essay on Government," in *Edinburgh Review*, March, 1829.

the hostility of savage nations. Once the deluge of barbarians has passed over it, to destroy and to fertilize; and in the present state of mankind we enjoy a full security against that calamity. That flood will no more return to cover the earth. But is it possible that in the bosom of civilization itself may be engendered the malady which shall destroy it? Is it possible that institutions may be established which, without the help of earthquake, of famine, of pestilence, or of the foreign sword, may undo the work of so many ages of wisdom and glory, and gradually sweep away taste, literature, science, commerce, manufactures, everything but the rude arts necessary to the support of animal life? Is it possible that, in two or three hundred years, a few lean and half-naked fishermen may divide with the owls and foxes the ruins of the greatest European cities—may wash their nets amidst the relics of her stately cathedrals? If the principles of Mr. Mill be sound, we say, without hestitation, that the form of government which he recommends will assuredly produce all this." Thus Macaulay rejected the doctrine of universal suffrage, holding it to be a scheme to set up a new tyranny, more dreadful than any which had preceded it, the tyranny of the majority, that is, of the poor and the ignorant; and he condemned the whole utilitarian theory of government, because, as he said, "It is utterly impossible to deduce the science of government from the principles of human nature."

Doubtful character of utilitarian theory of government

Macaulay himself was an aristocrat, by conviction if not by birth. He believed that "the higher and middling orders are the natural representatives of the human race," and that, though their interests may in some respects be opposed to those of their poorer and less favored contemporaries, they are identical with those "of the innumerable generations which are to follow." The Utilitarians themselves were not above the suspicion of

holding to some extent a similar conviction. Mill indeed had written: "The opinions of that class of people who are below the middle rank are formed, and their minds directed, by that intelligent, that virtuous rank, who come the most immediately in contact with them. . . . There can be no doubt that the middle rank . . . is that portion of the community, of which, if the basis of representation were ever so far extended, the opinion would ultimately decide. Of the people beneath them, a vast majority would be sure to be guided by their advice and example." This naïve revelation of the manner in which the Utilitarians expected that the "intellectuals," to borrow a later expression, that is, themselves, would gain power by the adoption of mankind suffrage and the advent of democracy, was eagerly pounced upon by Macaulay. It would be more reputable, he wrote, "if they would take up the old republican cant and declaim about Brutus and Timoleon, the duty of killing tyrants and the blessedness of dying for liberty. But on the whole they might have chosen worse. They may as well be Utilitarians as jockeys or dandies. And, though quibbling about self-interest . . . and the greatest happiness of the greatest number, is but a poor employment for a grown man, it certainly hurts the health less than hard drinking and the fortune less than high play."

Abandonment of utilitarian attempt to reconcile justice and legality

The rejoinder to Macaulay was made by a younger man even than himself, and one who in his way was no less gifted with the power of intellect, James Mill's son, John Stuart Mill. The debate that ensued between them is one of the most interesting specimens of intellectual gymnastics in British polemical literature. They ultimately divided the honors between them. The truth, which is easier to see now with the advantages of a century of further experience, did not altogether lie with either. Macaulay's Whiggish political philosophy was finally abandoned by

his countrymen when in 1911 they accepted the misnamed reform of the House of Lords. The utilitarian policy of universal suffrage eventually prevailed with the adoption of the Representation of the People Act of 1918. But the Utilitarians could not conceal their misgivings concerning the absolute democracy which their arguments were designed to justify. John Stuart Mill devoted his life to the vindication of his father's and Bentham's principles, and ended by renouncing them. His work in political philosophy culminated in the noble essay on *Liberty*. There he conceded the dangers of injustice at the hands of popular majorities, as well as at those of single tyrants or any other number of persons who might gain unrestricted control of the authority of a state. He repudiated the identification of justice with the commands of the sovereign, however sovereignty might be constituted. To establish justice he declared it to be necessary to recognize a field of human action which political authorities should never invade. He struggled to define the limits of this field, but with indifferent success. The separation of political and natural justice was a task beyond his powers.

Spencer's rational utilitarianism

The task fell to others, better equipped than the early Utilitarians and forewarned by their failure. Of these later, self-styled rational, Utilitarians the most notable was Herbert Spencer. Spencer clung tenaciously to the greatest happiness principle, but he rejected the method of the earlier, or as he styled them, the empirical Utilitarians. In each successive case, he complained, they contemplated only the effects of particular governmental acts on the conduct and happiness of particular men or classes of men, and ignored the general effect produced by governmental activity on the progress of successive generations of men. He insisted upon the necessity of a long range view of the relations between individuals and the communities, both political and non-political, to which they might belong.

The existing generation of men was but a link between the past and the future, and the fuller knowledge of the past which the natural scientists like Darwin and his associates were bringing about enabled them to take better thought for the future. In his book, *Social Statics,* published in 1851, Spencer described the state of universal warfare maintained throughout the lower creation and showed that in the long run an average of benefit resulted from it: that is to say, in the now familiar language of the evolutionary biologists, the struggle for existence resulted in the survival of the fittest. That struggle continued among the higher forms of animal life and ultimately, if permitted to run its course, would produce a being completely adapted to its environment and therefore capable of the highest happiness. It was in the human race that this consummation was to be attained. Civilization was the final stage in its accomplishment. The ideal man would be the man in whom all the conditions of that accomplishment were fulfilled. "Meanwhile," wrote Spencer, "the well-being of existing humanity, and the unfolding of it into this ultimate perfection, are both secured by that same beneficent, though severe, discipline, to which the animal creation at large is subject: a discipline which is pitiless in the working out of good: a felicity-pursuing law which never swerves for the avoidance of partial and temporary suffering. The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and those shoulderings aside of the weak by the strong, which leave so many in shallows and misery, are the decrees of a large, farseeing benevolence."

Revival of idea of natural justice

This was at once a gospel of hope and of despair, hope for the fortunate beneficiary, present or future, of this mighty evolutionary process, despair for its unhappy victim. But if the happiness of all the beneficiaries, from the present to the most remote future of the human race,

were set off against the sufferings of the victims, the judgments of the "farseeing benevolence" which animated the process of evolution were, upon utilitarian principles, more likely to be just than any counter-decisions of ordinary mortals, even when clothed with all the prerogatives of sovereign power. "All these evils, which afflict us," he wrote, "and seem to the uninitiated the obvious consequences of this or that removable cause, are unavoidable attendants of the adaptation now in progress. . . . The process must be undergone, and the sufferings must be endured. No power on earth, no cunningly devised laws of statesmen, no world-rectifying schemes of the humane, no communist panaceas, no reforms that man ever did broach or ever will broach, can diminish them one jot." Holding such views as this, Spencer had no difficulty in repudiating altogether the Benthamite proposition that the rights of men are derived from the state. The rights of men, he believed, existed independently of the state, being derived from the same source as life itself, the decrees of the "large, farseeing benevolence" which had dictated their survival. Justice was neither identical with the laws of the democratic state, as Bentham argued, nor with the interests of the majority who dictate such laws. The will of the majority had no connection with justice that Spencer could discover, despite the syllogisms of the younger Mill. Justice, he concluded, was identical with the laws of nature, or rather with the laws of modern science as understood by the nineteenth century evolutionists. In other words, it was identical with the interests of the strong and the energetic and the enterprising—in short, with the interests of those able to succeed in the struggle for existence, whether a majority or only a minority of the population.

The test of this fatalistic doctrine lay in its application. If the strong and energetic members of any community

found themselves hampered in their efforts to push themselves forward by the activities of a government administered in the interests of a privileged class which had outlived its usefulness to the community, then the doctrine was a liberal one, tending to promote a change of policy. But if the masterful elements in the community found their interests to lie in the maintenance of the established policy, whatever that might be, then the doctrine was thoroughly conservative, tending to preserve the *status quo*. A full generation after the publication of his *Social Statics*, Spencer made his own application of his doctrine to the condition of England in a remarkable series of pamphlets, entitled *"Man versus the State."* He had foreseen the rising tide of social reform, and recognized its repugnance to the principles of his "rational utilitarianism." He denounced as "the coming slavery" all measures such as free compulsory education, regulation of the liquor traffic, factory legislation, workmen's insurance, and the imminent successor of social reform, state socialism. The enslavement of man to the state he thought as lamentable as that of man to man. He denounced "the sins of legislators," who were trying to "interfere" with the beneficent results of "natural selection" and the whole evolutionary process. Above all he assailed "the great political superstition," the doctrine of the "divine right of parliaments" which had succeeded, he observed, to that of the divine right of kings. He was really assailing the practical success, despite theoretical failure, of the very empirical utilitarianism, which his own "rational" utilitarianism was designed to supersede. But in rejecting the Benthamite doctrine of sovereignty, and denying the supremacy of political authority in the state, he was threatening the very foundations of the state itself. He stopped short of the advocacy of anarchy by working out a doctrine of civil liberty, which will be discussed in another place. The full implications

Identification of justice with the interests of the strong

of his idea of justice were perhaps never realized by himself. It remained for another to grasp them, and to pursue them with amazing audacity to the bitter end.

Nietzsche's abandonment of the idea of political justice

The man who did this was the ill-fated German philosopher, Nietzsche. He tried to expound his version of the evolutionary philosophy in a series of strange writings, culminating in a masterpiece to be entitled, *The Will to Power*. A stroke of insanity, however, frustrated his design. Of his completed works the most characteristic is the unique production entitled, *Thus Spake Zarathustra*. This was composed at about the same time as Spencer's *Man versus the State*. But Zarathustra spoke, not of man, but of the superman. "Man is something that is to be surpassed. . . . All beings hitherto have created something beyond themselves; and ye want to be the ebb of that great tide, and would rather go back to the beast than surpass man? What is the ape to man? A laughingstock, a thing of shame. And just the same shall man be to the Superman, a laughingstock, a thing of shame. . . . Lo, I teach you the Superman. The Superman is the meaning of the earth. Let your will say: The Superman *shall be* the meaning of the earth! I conjure you, my brethren, remain true to the earth, and believe not those who speak unto you of superearthly hopes!" As he rejected religion and the church because they may comfort the afflicted and succor those who are in distress, so likewise he rejected the state. "A state? What is that? . . . Many, too many are born: for the superfluous ones was the state devised. . . . There, where the state ceaseth, there only commenceth the man who is not superfluous. . . . There, where the state ceaseth—pray look thither, my brethren! Do you not see it, the rainbow and the bridges of the Superman?"

Philosophical anarchy

And so the most mercilessly logical of the evolutionists would do away with all organized action to protect man

against man, and would leave him alone and exposed to the "beneficent, though severe discipline, to which the animal creation at large is subjected." The state, like the church, is condemned because it mitigates the severity of the struggle for existence and hinders the survival of the most fit. It preserves the weak at the cost of the strong, and hence reduces the general level of mankind, and retards the development of a higher species. Such a doctrine dispenses with the idea of political justice as a distinct concept for the guidance of human conduct. It merges justice with liberty and explains both in terms of the laws which govern the animal kingdom in general. Instead of a state we have that most merciless of conditions, the anarchy of the brute creation.

Identification of justice with the interests of the weak

It is a relief to turn from such heartless and ill-balanced rhapsodies to speculations which, if not more logical and fruitful, are at least more humane. Alongside of those who plead the cause of the powerful and the prosperous there have always been others to plead for the weak and the downtrodden. "From each according to his ability, to each according to his need," is a rule of conduct which obtains in the family. Why, it has occurred to many to inquire, should it not also prevail in the state?

Utopian Socialists' ideas of justice

During the nineteenth century, especially during the earlier part of the century and in the United States, numerous attempts were made to found select communities upon this or some similar principle of justice. Robert Owen, St. Simon, Fourier, Cabet, to mention only the best known of the promoters of such enterprises, with their New Harmonies and Hopedales, their Brook Farms and Icarias, made valiant efforts to solve the social problem by building the state anew instead of reforming the old. None of these local experiments in communism was an unqualified success, though a few, like the flourishing Oneida Community, have achieved prosperity by aban-

doning their principles. Most were rapid and complete failures, leaving behind nothing but their names "to point a moral or adorn a tale." No attempt has been made to administer a modern state upon these principles, for such justice cannot be enforced by any of the available governmental processes. It must be a free-will offering on the part of those who have the ability. It might be found in a co-operative commonwealth, bound together by ties of sympathy and love. But existing political communities are deficient in the elements from which such spontaneous cohesion might spring. They are held together by a combination of ties of which sympathy is only one, and probably one of the weakest. Under modern conditions of life, moreover, communism, as conceived by the social revolutionists of the early nineteenth century, would not be more than a form of local government. It could not solve the problem of justice in a World Power.

Kropotkin and the problem of Utopian justice in a World Power

The social revolutionists of the later nineteenth century realized the inadequacy of the earlier schemes to the circumstances of what Graham Wallas happily calls the Great Society. The most intelligent among them, such as Kropotkin, the princely Russian revolutionist, tried to revise the gospel of communism in the light of the teachings of modern science. The doctrines of the Darwinian evolutionists seemed to them too cold and harsh. Kropotkin in his *Mutual Aid, a Factor in Evolution,* stressed the importance of sociability to the progress of mankind in the more advanced stages of the struggle for existence. Indeed, penetrating students of the evolutionary biology everywhere had been quick to perceive the value of fraternal impulses and instincts among the members of competing social groups. Bagehot pointed this out in his *Physics and Politics,* published while the extreme individualism of Spencer and Nietzsche was still in the making. Nowhere would a well developed spirit

of fraternity be of greater advantage than among the people of a modern imperialistic state, deeply involved in the struggle for existence with imperialistic neighbor-states. On the principles of the evolutionists the people who tend to survive might be supposed to be those most capable of effective collective action. Modern German writers like Treitzschke recognized this, and emphasized it in their political philosophy. Spencer also recognized it, and concluded his celebrated essay on *Man versus the State* with a lamentation that existing peoples were so militant in their character that his theory of rational justice was only an iridescent dream, not suited to the actual condition of society. Kropotkin attacked more realistically the problem of reducing the principles of justice to practice in the actual world, and in his *Conquest of Bread* tried to show how it might be done. He necessarily ceased to be a philosophical anarchist, as such revolutionists as he were sometimes called, and advocated a system of government founded upon the federation of local communities. This solution inevitably raised all the problems involved in any kind of federal government. It does not answer the question, What is justice in the modern state?

Realistic theories of justice

All the preceding theories of justice, except those of the philosophical and sentimental anarchists, seek to justify the law by justifying the authority behind the law. Thus they hope to succeed in identifying justice with legality. What is legal should be right. This is true even of the later utilitarian and ultra-individualistic theories, including that of Herbert Spencer, as long as the civil law is directed toward those ends, and no others, which are compatible with the laws of nature. The distinction between just and unjust, that is, between lawful and unlawful, conduct is made to turn on the nature and source of the law itself. Law is defined as the command of the

sovereign, and the sovereign as that agent of the state who is invested with the supreme power, unrestrained by human law and subject only to the dictates of its own reason. Such a sovereign may be a single person, which Hobbes urged as the most convenient and serviceable form of sovereignty, or any number of persons. In any case sovereignty must be founded upon power, and power may be resolved into the forces from which it is generated. Thus the task of justifying the law becomes that of vindicating the authority of the interests behind the law. The interests behind the law may be those of the few or of the many, of the rich or of the poor, of the intelligent or of the ignorant, of the strong or of the weak. Such theories of justice may be termed realistic, because the will of the state, which is the source of justice, is the will of a real person or group of persons within the state.

Practical significance of realistic theories of justice

These realistic theories of justice have a tendency to establish right by fact. In the words of Pope:

> And spite of pride, in erring reason's spite,
> One truth is clear, Whatever is, is right.

Hobbes sought to vindicate the rule of the strong, because power seemed to him the essence of the state, and the stability of the state essential to the successful pursuit of happiness. Spencer also sought to vindicate the rule of the strong, but the exigencies of his times constrained him to a theory of government directly contrary to that of Hobbes. Absolutism in the nineteenth century no longer appeared mainly in the form of absolute monarchy. Since the French Revolution there has always been the alternative of absolute democracy. The latter form seemed to Spencer full of menace to the interests of the strong, that is, those most fit physically and mentally for success in a comparatively unregulated struggle for existence, because it enabled the weak by force of numbers to overpower

those who, upon Spencer's principles, were fitted for survival. He wished to limit political justice by natural justice. Hence, in flat contradiction to Hobbes, he was constrained to devise a theory of sovereignty which would confine the supreme power in the state, that is, the authority of the governing class, within certain narrow limits. Nietzsche, indeed, would have narrowed those limits to the point where political authority was reduced to nothing. There would be no political justice, but only natural justice. The result was to be the same: the strong were to be in a position to advance their own interests at the cost of the weak. Justice meant the sacrifice of the interests of the many for those of the favored few.

Identification of justice with the interests of a part of the state

The original program of the empirical Utilitarians seemed calculated to produce a contrary effect. The many were to be in a position to advance their interests at the cost of the few. These terms, few and many, strong and weak, may be translated into others which will express more accurately at a given time and place the real situation. We may substitute intelligent and ignorant, or rich and poor, and the effect is the same. It is that the interests of a part of the whole body of people who constitute the state are preferred, or at least are in a position to be preferred, to those of the whole body. Justice becomes identical with the interests of that part. In a militarist state it becomes identical with the interests of the powerful; in a capitalist state, with those of the rich; in a proletarian state, with those of the poor; in a nationalist state, with those of the dominant national group; in an ecclesiastical state, with those of the church. But willful and deliberate preference for the interests of a privileged class is commonly called injustice, not justice.

This is the fundamental fault of every realistic theory of justice. The expression of the will of the state, if the form of government is consistent with the theory of justice,

Imperfection of all realistic theories of justice

is controlled by the opinion of a real person or group of persons, and there is nothing in the nature of the idea of justice to prevent these persons from using their power exclusively in their own interest. Such a theory of justice furnishes no answer to the revolutionist who repeats after Rousseau: "If I considered only force and the results that proceed from it, I should say that so long as a people is compelled to obey and does obey, it does well; but that, so soon as it can shake off the yoke and does shake it off, it does better; for, if men recover their freedom by virtue of the same right by which it was taken away, either they are justified in resuming it, or there was no justification for depriving them of it."[1] These theories, however pleasing they may be to those in any state who enjoy or expect to enjoy the possession of power, cannot satisfy those who are discontented with the established law and order. Rousseau pointed out in his inimitable way the practical difficulty with such theories, when he said that "a juster method might be employed, but none more favorable to tyrants."[2]

3

Rousseau and the idealistic theory of justice

Rousseau was, in fact, the man who did most to introduce in modern times a more satisfactory theory of justice. He was a facile and graceful as well as a prolific writer, and exercised an extraordinary influence, not so much on account of the originality of his ideas as on account of the clearness with which he visualized the cardinal problem of politics and the force with which he stated his proposals for its solution. Like many writers to whom writing is easy, Rousseau wrote too much and not a little of this is written too well. Had it been more difficult for him to write, he might have expressed his thought more exactly;

[1] *The Social Contract,* Book I, Chapter I.
[2] *Ibid.* Book I, Chapter 2.

and if he had written less, he certainly would have avoided many inconsistencies. His earlier writings, the *Discourse on the Progress of the Arts and Sciences,* and the *Discourse on the Origin and Basis of Inequality among Men,* are badly infected with the romantic sentimentality which pervades so much of the political literature of the eighteenth century. As Dunning has aptly said: "He was himself the free and noble savage whom he pictured so pleasingly in his works. The *Confessions* . . . contain scarcely more of his intellectual autobiography than can be found in his *Discourses* and other political writings."[1]

But the reality was much less pleasing than the romance, and Rousseau's manner of living does not tend to inspire confidence in the sanity of his outlook on life or in the soundness of his judgment. Moreover, he was a superficial student of political science; he was ignorant of practical politics and very largely ignorant of history. Nevertheless, his later writings, notably the *Considerations on the Government of Poland* and those also on that of Corsica, written in response to requests for advice from patriotic admirers in ill-ordered foreign lands to which his fame had penetrated, reveal genuinely broad human sympathies and no inconsiderable acuteness in the analysis of practical problems and in the elaboration of remedies. But his *forte* was not practical statesmanship. He himself candidly confessed: "If I were a prince or a legislator I should not waste my time in saying what ought to be done; I should do it or remain silent." He never could have been a legislator, and what he said should be done by legislators proved to be of much less value to such persons than to the downtrodden and oppressed.

Rousseau's most influential book *The Social Contract,* was devoted, as the subtitle indicates, to the elucidation of the principles of political justice. He saw that the cardinal

[1] William A. Dunning, *The History of Political Theories,* Vol. III, p. 3.

Identification of justice with the interests of all the people of the state

problem of politics is that of obedience. He was not concerned so much with the fact, as with its justification. Most men live in servitude, voluntary or involuntary, to a comparatively few. What, he inquired, can make such servitude not only legitimate but also just? "Man is born free, and everywhere he is in chains. . . . How has this change come about? I do not know. What can render it legitimate? I believe that I can settle this question." By these celebrated opening sentences he seems to have meant that all government is of human contrivance and that the then existing governments were unjust contrivances. His solution of the problem is simple enough in theory. Just laws can be found only in a state where political authority rests upon the force of opinion which is truly public and general, and not merely the opinion of a person or group of persons constituting but a part of the state. If public opinion be regarded as the expression of the will of a state, in which justice is to prevail, then that will must be not only real, but also general. This general will he declared to be the only true sovereign of a state which is founded upon justice. Since by its nature it must be directed toward ends which are in the interest of all the members of the state, it can never be wrong, and whatever it commands must be just. Justice, therefore, is identical with the interests, not of any part of the state, but of the whole body of people.

Practical significance of idealistic theory of justice

There are many difficulties in the way of those who would reduce this idea of justice to practice. How shall the general will be ascertained in concrete cases? Shall any body be recognized as the authoritative interpreter of the general will? If so, who shall judge between this body and the rest of the people, when the latter dissent from the official interpretation of the general will? But if there is no special interpreter of the general will, can there be any just action in the state except by unanimous

consent? If not, political action becomes impossible, for political authority can never wait for unanimous consent in those cases where any substantial interests will be affected by invoking it. Under such conditions the state would be no state but anarchy. Political authority is of value only where it can be used to diminish friction between conflicting interests and, if necessary, to overcome resistance on the part of some against others. Rousseau had undertaken to show how effective political authority might be rendered legitimate, that is, how it could be justified. He did not propose to weaken the authority of rightly constituted states, but to strengthen it. Political authority in his ideal state, therefore, could not be founded upon unanimity. But then what is the meaning of his talk about the sovereignty of the general will? If an authoritative interpreter of the general will is established, the decisions of that body, whatever it is, in conflicts of interest between competing groups within the state, must be final. If final, there can be no appeal, when they seem to sacrifice unduly the interests of some members of the state to those of others, not even when they sacrifice the interests of all other members of the state to those of the authoritative interpreter of the general will himself. Such a conclusion exposes the state to irreparable injustice, if justice be understood as identical with the interests of the whole. The idealistic theory of Rousseau is thus reduced in practice to the same terms as the realistic theories to which he was so bitterly opposed.

The establishment of justice—a problem of government

It is evident that the problem of justice is resolved into a problem of government. How shall the state be constituted,—in other words, how shall the body of people who compose the state be organized, so that political authority may be put and kept in the hands of those who will inflexibly use it for the good of the whole body and never in the interest of themselves alone or of any part without

due regard for the rest? In short, what form of government will compel the rulers of men always to pursue public rather than private purposes? How may public be made to prevail over private interests?

Rousseau's theory of government

Rousseau never answered these questions satisfactorily. He seems to have supposed that in ordinary affairs the opinion of the majority was a safe guide to that of the whole body of people, and that in extraordinary affairs the common welfare could be adequately secured by requiring as the condition of action the consent of two-thirds or three-fourths of the whole number of citizens, or of such other exceptional majority as might be deemed suitable. When confronted with the question, How shall the member of a minority, which has been voted down on some matter touching intimately their honor or vital interests, be reconciled to the result? he became involved in a labyrinth of sophistry. The confusion into which Rousseau fell when wrestling with this problem has obscured the value of his theory of justice itself. In fact, Rousseau had not the equipment, either in philosophical power or in historical knowledge, to produce a final solution of the problem. He could only state it, and this he did in a style so popular and so compelling that his name became, during the revolutionary era which began in France in 1789, the inspiration of millions of the masses of men.

Can the sovereignty of the general will be practically realized?

The man with the intellectual vigor to state rationally Rousseau's solution of the cardinal problem of politics was the great German idealistic philosopher, Kant. Rousseau had explained the general will as the product of an original contract or social compact, by which each citizen covenanted with the whole people and the whole people with each citizen that all should be governed by laws enacted for the common good. This doctrine was a variation of that previously elaborated by Hobbes. Hobbes,

however, had argued that the sovereign himself was not a party to the compact but merely its creature. Hence he was not bound by its terms, but, on the contrary, was absolutely free to use the power which the compact conferred upon him in accordance with his own judgment and, if he chose, primarily in his own interest. Rousseau's sovereign was the general will which emanated from the body of people, who collectively and individually were the parties to the compact, and theoretically was no less absolute and incapable of doing wrong than the absolute monarch of Hobbes. Rousseau's practical problem was to show how such a general will could become real without losing its general character. If that problem can be solved, the result must be a theory of government as much superior to that of Hobbes as the wisdom and conscience of all men are to the wisdom and conscience of any one man. Kant accepted Rousseau's doctrine of the social compact, but gave it, as Rousseau had failed to do, a clear and rational meaning.

Kant's statement of the idealistic theory of justice

"We have before us," he wrote,[1] "the idea of an original contract as the only condition upon which a civil, and therefore wholly legal, constitution can be founded among men, and as the only basis upon which a state can be established. But this fundamental condition—whether called an original contract or a social compact—may be viewed as the coalition of all the private and particular wills of a people into one common and public will, having a purely juridical legislation as its end. But it is not necessary to presuppose this contract or compact to have been actually a fact; nor indeed is it possible as a fact. We have not to deal with it as if it had first to be proved from history that a people into whose rights and obligations we have entered as their descendants did actually on a certain

[1] Immanuel Kant, *The Principles of Political Right,* 1793; cf. *Eternal Peace and Other International Essays,* published by the World Peace Foundation, 1914, p. 40.

occasion execute such a contract, and that a certain evidence or instrument of an oral or written kind regarding it must have been transmitted so as to constitute an obligation that shall be binding in any existing civil constitution. In short, this idea is merely an idea of reason; but it has undoubtedly a practical reality. For it ought to bind every legislator by the condition that he shall enact such laws as might have arisen from the united will of a whole people; and it will likewise be binding upon every subject, in so far as he will be a citizen, so that he shall regard the law as if he had consented to it of his own will. This is the test of the rightfulness of every public law. If the law be of such a nature that it is impossible that the whole people could give their assent to it, it is not a just law. . . . But if it be possible that a people consent to a law, it is a duty to regard it as just, even supposing that the people were at the moment in such a position or mood that if it were referred to them their consent to it would probably be refused."

The American version of the idealistic theory of justice

The will of the real rulers of a state, therefore, becomes a general will and hence the proper source of a political authority from which justice must flow, when the powers which they exercise are derived from the consent, expressed or implied, of the governed. The laws which these rulers enact and administer are just, when designed for the welfare of the state and supportable, if not actually supported, by a sound and enlightened public opinion. This is familiar American doctrine. The Declaration of Independence includes among the truths which were held to be self-evident the proposition that governments derive their just powers from the consent of the governed. But there is one important distinction between the doctrine of the American Declaration and that of the German idealist. The former holds that the final justification of the law depends upon the use by the government

of its just powers to secure the inalienable rights of man. Kant holds that the test of justice is the use of the authority of the government to promote the welfare of the state. What, then, is the significance of this distinction between securing the rights of man and promoting the welfare of the state? Are these fundamentally identical standards of justice? Or is there a real difference between them?

Kant's statement of the idealistic theory of the state

Kant put his own interpretation on the expression, the welfare of the state. "By this is not to be understood," he wrote,[1] "merely the individual well-being and happiness of the citizens of the state; for—as Rousseau asserts—this end may perhaps be more agreeably and more desirably attained in the state of nature or even under a despotic government. But the welfare of the state as its own highest good signifies that condition in which the greatest harmony is attained between its constitution and the principles of right—a condition of the state which reason by a categorical imperative makes it obligatory upon us to strive after."

The state a moral organism

Subsequent idealistic philosophers have abandoned Kant's terminology, but his thought has been preserved. Men, they hold, will not rest until a harmony which can satisfy their consciences is established between the political institutions under which they live and the principles of right in which they believe. The idea of the state as an organized body of people where such a harmony is established, that is to say, where justice prevails, is the standard by which the idealist measures the institutions and laws under which he is constrained to live, and tests all proposals for their improvement. Such a state may be described as a moral organism. Its members, like those of a physical organism, are dependent for their most perfect development upon the health of the whole body. Un-

[1] *Eternal Peace,* World Peace Foundation edition, p. 142.

like a physical organism, the whole as a whole and not a mere aggregation of parts has no objective existence but lives only in the consciousness of those who are united in sharing the common ideal. That the ideal is as real as anything that leads to human action is demonstrated by the fact that men willingly die for their country. Patriotism is no less real than hunger or thirst. The state, regarded as a moral organism, is no less real than food, clothing, or shelter.

Unsettled problems in political theory

Many subsequent writers have tried to explain this idealistic theory of the state and of justice. Some of them have put it in a form more readily comprehended than that which we owe to Kant. But nothing essential has been added to the substance of the theory. The important subjects of later inquiry have been these: (1) How shall existing political institutions be altered, in order to attain more nearly the harmony with the principles of right for which men strive? (2) What shall men do when such harmony is lacking and the resulting discord seems intolerable?

Kant's theory of government

Kant's answers to these questions were hardly more satisfactory than those of Rousseau. Kant, as has been shown, like Rousseau, merged the problem of justice into that of government. The principles of right, with which, he believed, the constitution of the state must harmonize, prove upon analysis to be republican principles. He understood republican principles in much the same sense as those French Revolutionists who, inspired like himself to a degree by the ideas of Rousseau, then acting so powerfully upon the minds of men, were proceeding with their experiments in the reduction of ideals to practice before his very eyes. Kant would not have approved the governmental methods of the Revolutionary Convention except as a temporary expedient. His theory of government is more accurately represented by the Constitution of the

Year One, adopted by the Convention while its more idealistic and sanguine members were still untouched by the guillotine. This constitution was never put into effect, and certainly could not have been worked successfully by the men of the Revolution. Kant prepared his own version of the Revolutionary slogan, liberty, equality, and fraternity.[1] His version was, philosophically at least, an improvement on the original. But in effect he concluded by subscribing, much as Rousseau had done, to the dogmas of universal suffrage and unlimited majority rule. His answer to the first of the two questions stated above left the theory of government, therefore, no further advanced than before. His answer to the second, like that of Rousseau, must be deferred for consideration in connection with the problem of liberty.

Perversion of the later German idealism

With the lapse of time and the evident frustration of much that the French Revolutionists sought to accomplish, the German idealists who succeeded Kant, notably Fichte and above all, Heger, gave to his ideas new and strange shape. They accepted his theory of justice and his doctrine of sovereignty, but rejected his faith in the absolutism of popular majorities. They believed that the general will could be more safely interpreted by the classes than by the masses, by Junkers and bureaucrats than by peasants and artisans. With one eye, indeed, upon the eternal verities but with the other upon the King of Prussia, they espoused the cause of the *status quo,* when the reaction against the principles of the Revolution was running strong, and gave to the idealistic political philosophy a conservative cast which, culminating in the writings of men like Treitzschke, satellites of warriors rather than teachers of statesmen, produced the apotheosis of the Hohenzollern dynasty and the ruin of Germany.

The idealistic political philosophy has run a happier

[1] Cf. *Eternal Peace,* World Peace Foundation edition, pp. 31, 137.

Political idealism in England and America

course in the English-speaking countries. In England a line of liberal-minded thinkers, notably T. H. Green, repudiating the mysticism and reactionary character of the later German idealism, purified and fortified the idealistic way of thinking by reviving the influence of the original masters of idealistic philosophy, Plato and Aristotle. Thus they have been able to enter powerful pleas for the recognition in the state of the supremacy of the interests of the whole over those of any part. But it is in America that the idealistic political philosophy has exercised its greatest influence. Since 1776 Americans have recognized that it is not enough to justify the authority which makes the law. It is necessary also to justify the end which the law is designed to serve. The individual, as we say, does not exist for the state, but the state for the individual. Here the later German idealists went astray. Eventually the consequences of their error proved most lamentable. Americans, on the contrary, have always insisted that the welfare of the state must be reconciled with the rights of man. That means that the government of the state must not only establish justice, but also secure the blessings of liberty. The nature of liberty will be examined in the following chapters, which will incidentally shed some further light on the nature of justice also. Meanwhile, it must be confessed, justice, as conceived by the political idealists, seems somewhat nebulous and unreal. To establish that kind of justice means essentially to adjust the various conflicts of interest existing within a state in such manner as might be sustained by a sound and enlightened public opinion. But opinions, even public opinions, differ. It is evident, therefore, that there must be many different kinds of adjustments which might be so sustained. In other words, idealistic as well as realistic theories of justice will have different meanings in different kinds of states.

Summary of idealistic theory of justice

Yet certain general conclusions concerning the nature of political justice may be summarily stated. According to the political idealists, justice is such an adjustment of the conflicting interests within the body politic as most to promote or least to injure the best interests of the whole body of people. In the ideal commonwealth that would be such an adjustment as most to promote the virtue, or to use a homely word instead of the classical expression, the manliness, of the community as a whole. This proposition is as old as Plato's *Republic* and, after all is said, little has been added to it since that immortal work was composed. In the militarist commonwealth it means such adjustments as best promote the strength of the community. In the capitalist commonwealth it means such adjustments as best promote the wealth and prosperity of the community. In the proletarian commonwealth it means such adjustments as best promote equality, at least of opportunity, in the community. But justice in the militarist commonwealth must be distinguished from that policy which deliberately prefers the interests of the strong to those of other members of the community. Such a policy is not justice, but injustice. A state in which such a policy prevails is no true commonwealth. Likewise, justice in capitalist and proletarian commonwealths must be distinguished from policies of deliberate preference for the interests of the capitalist and proletarian classes, respectively, over those of the rest of the community. Such policies are highly oppressive and tyrannical. Justice, as the political idealists understand it, may differ in different types of commonwealths, but the fundamental idea remains the same, the subordination of the interests of each part of the people to those of the people as a whole. Otherwise injustice must prevail.

NOTES ON BOOKS

1. See the Modern Legal Philosophy Series, edited by a Committee of the Association of American Law Schools, and especially Vol. 2, F. Berolzheimer's *The World's Legal Philosophies* (translated by R. S. Jastrow, 1912).

2. The principal books are cited in the text of this chapter and the notes appended to preceding chapters, especially Chapter II. In general realistic theories of justice follow logically from realistic theories of the state, and idealistic theories of justice from idealistic theories of state. The standard work on the type of realistic thought that has had most influence in English-speaking countries in recent times is L. Stephen, *The English Utilitarians* (2d ed., 3 vols., 1900). An ingenious modern instance of an ancient method of political speculation is furnished by G. L. Dickinson's *Justice and Liberty, a Political Dialogue* (1908). An interesting account of the more imaginative theories of justice, including some that are merely fanciful and others that are fantastic, is contained in L. Mumford's *The Story of Utopias* (1922.) See also J. O. Hertzler's *History of Utopian Thought* (1923). Notable among recent specimens of idealistic Utopian thought are H. G. Wells's *A Modern Utopia* (1907), and *Men Like Gods* (1923).

3. There are several good editions of Rousseau's *Social Contract.* The best is that of C. E. Vaughan (1917), which contains an illuminating and sympathetic introduction. The edition in the Everyman's Library is also noteworthy because of the instructive introduction by G. D. H. Cole. An unsympathetic view of Rousseau may be found in Dunning's *History of Political Theories,* vol. iii. See also the penetrating review of Vaughan's edition by H. J. Laski in *The New Republic* (July 16, 1919), which reveals the fatal defect of Rousseau's exposition of the idealistic theory. But Mr. Laski is mistaken, I think, in believing that the theory itself is incurably defective. Kant's writings on political philosophy have been published by the World Peace Foundation in a convenient volume, entitled *Eternal Peace and other International Essays* (translated by W. Hastie, 1914). Hegel's *Introduction to the Philosophy of History,* and his *Philosophy of Law* have been published, with instructive introductions, in *The German Classics* (ed. by K. Francke, vol vii, 1914). See especially T. H. Green's *Principles of Political Obligation* (see p. 83, *ante*). Mention should also be made of W. W. Willoughby's *Social Justice* (1900), the most satisfactory volume of its kind by an American writer.

CHAPTER VII

LIBERTY

1

What is liberty?

AMONG the purposes of the people of the modern commonwealth that which can most conveniently be considered next after justice is the one which the framers of the Federal Constitution put last: "to secure the blessings of liberty to ourselves and our posterity." What, then, is liberty, this ultimate affair of state?

"There is no word," declared the great French political scientist, Montesquieu, "that admits of more various significations, and has made more different impressions on the human mind, than that of liberty."[1] In Christian countries many people look to the Bible or to the church for the most authoritative statement of their fundamental ideas. They have not looked in vain for the definition of liberty. "Where the Spirit of the Lord is," according to Paul the Apostle, "there is liberty."[2] The members of those Christian churches which by their religion recognize the duty of each individual to put his own interpretation upon the Scriptures according to his own conscience have interpreted this passage variously. An interpretation which profoundly influenced the growth of political ideas in America was recorded by the great poet, John Milton, Latin Secretary to Oliver Cromwell and an active politician under the Puritan Commonwealth. "Know that to be free," he wrote, "is the same thing as to be pious, to be wise, to be temperate and just, to be frugal and abstinent, and lastly to be magnanimous and brave." This admoni-

The Christian idea of liberty

[1] Montesquieu, *L'Esprit des Lois,* book XI, chapter IV. See also Francis Lieber, *Civil Liberty and Self-Government,* chapter II.

[2] See II Corinthians, III:17.

tion he inserted in his once well-known *Second Defence of the People of England,* an official polemic designed to justify the execution of Charles I and the overthrow of the Stuart Monarchy. Subsequently he put his idea of liberty into more durable form in one of his greatest dramatic poems.

> Yet he who reigns within himself, and rules
> Passions, desires, and fears, is more a king;
> Which every wise and virtuous man attains. . . .[1]

Those who look to the officers of the church for the authoritative interpretation of the Scriptures will receive a similar answer. "That liberty is truly genuine," declared Pope Leo XIII in his encyclical letter on *The Christian Constitution of States,* "which in regard to the individual does not allow men to be the slaves of error and of passion, the worst of all masters."[2] Although the Pope could speak with authority only for the apostolic Roman Catholic Church, he undoubtedly voiced an idea of liberty widely held by Christians.

Moral liberty

Thus the idea of liberty becomes an ideal of personal conduct. Liberty, so conceived, can be secured only by constant striving and self-sacrifice. It cannot be enjoyed by people who, in the words of Milton, "cannot govern themselves, and moderate their passions, but crouch under the slavery of their lusts." Goethe makes the expression of this idea of liberty the culmination of his philosophic masterpiece, when Faust concludes the quest for an ideal life with the confession:

> Yea, to this thought I cling, with virtue rife,
> Wisdom's last fruit, profoundly true,
> Freedom alone he earns as well as life,
> Who day by day must conquer them anew.[3]

[1] John Milton, "Paradise Regained," book II, lines 466 ff.

[2] Encyclical Letter *Immortale Dei,* November 1, 1885. See Ryan and Millar, *The State and the Church,* p. 19.

[3] "Faust," Part II, Act V, lines 532-5.

The liberty acquired by such a conquest may be termed moral liberty. It is the most important element in the character of individuals and of states. Unless it is found in good measure among a body of people, their state can be no true commonwealth.

Political liberty

Nevertheless, the definition of liberty as an ideal of personal conduct can afford no practicable guide to the statesman. The statesman must establish justice. He must prescribe rules of conduct to the individual, or at least must assume the responsibility for enforcing rules which his fellow citizens have prescribed by some tolerable process for themselves. When people undertake to enforce rules against one another, it is not enough that each should have a standard of conduct that satisfies himself. He must also be willing to conform to some standard that can command acceptance by others. Of course, the acceptance of a common rule of justice does not prevent individuals from setting up higher standards for themselves, provided that they do not fail to comply with that prescribed for others. But all must at least comply with the common rule. The kind of common rule which satisfies one man or group of men, however, may not satisfy others. Some may demand a higher standard for the administration of justice in the state than others wish to abide by. A choice must be made among the various possible standards, if a common rule is to be observed by all. That body of rules of conduct, which is chosen for the guidance of those who administer justice in the state, must be supported by the authority of the state as a whole. Thus the individual who prefers a different standard is confronted by the apparent conflict of authority with liberty. Can he be forced to be free? Or can there be no security for liberty in the commonwealth, unless the law derives its sanctity from the expressed consent of all? Must the freedom-loving individual choose between anarchy, on the

one hand, if he would avoid being forced to be free, and, on the other, in order to gain the advantages of law and order, absolute submission to the authority of established rulers? This is the dilemma that confronts every man who thinks of liberty, not merely as an ideal of personal conduct, but also as one of the ends which the commonwealth is organized to secure.

The apparent conflict between political liberty and authority

The apparent conflict between authority and liberty is the great tragedy of life in the modern state. Shall the unfortunate leper be suffered to go freely among his fellowmen, spreading a loathsome disease? Or shall he be exiled for life to a desolate island? Shall the gentle Quaker be allowed to dwell in his home in peace, while other men fight to save him and his family from a ruthless foe? Or shall he be conscripted for military service and forced, perhaps, to kill his fellow creatures? Shall the sincere Christian Scientist be free to act as if pain and disease did not exist? Or shall he be compelled to submit to the innoculation of his body with repulsive matter extracted from a diseased animal, to protect himself from risks which he is ready and willing to incur? Shall the honest Mormon be permitted to enjoy the aid of as many wives as he can support in fulfilling the scriptural mandate to go forth and replenish the earth? Or shall all but one of his wives be taken away and deprived of his love and care? Shall the wretched narcotic drug addict and dipsomaniac be free to relieve their exigent cravings? Or shall they be denied the consolation of the hypodermic injection and of the cup that cheers, though it also inebriates? Even when the results of the conflict are not tragic, they are likely to be vexatious. Why may we not resharpen our safety razor blades? Why may we not refill our patent refreshment bottles and tobacco packages? At every turn one encounters what must often seem to be unreasonable and improper restraints upon one's conduct.

2

The realistic definition of liberty

The victim of a conflict with authority is prone to define liberty as the right to do as one pleases. The unruly child, grudgingly submitting to parental authority, longs for liberty, the right to play as he pleases. The reluctant scholar, constrained to painful tasks by the discipline of the school, longs for liberty, the right to study as he pleases. The weary toiler, exhausted by the pace of the factory, longs for liberty, the right to work as he pleases. The anxious employer, harassed by restrictive labor legislation and trade union regulations, longs for liberty, the right to run his business as he pleases. The good citizen, burdened with taxes, jury service, political campaigns, unpopular laws, annoying administrative regulations, and generally unsatisfactory public services, longs for liberty, the right to live as he pleases. Such liberty means something tangible and real; namely, the absence of unwelcome interference with his personal activities and general conduct of life. To live and let live, that is a rule of freedom which makes a strong appeal to any fair-minded man. To the unhappy victim of authoritarian oppression and tyranny, whether in the home, in the school, in the workshop, in the business world, or in the state, this realistic view of liberty is bound to be attractive. A claim to such liberty is a justification for resistance to the oppressor and tyrant. If liberty means the right to do as one pleases, those who enjoy such liberty are free to disobey at pleasure the authorities who may be set over them. Rational beings presumably will disobey, whenever obedience is disagreeable, and disobedience does not seem likely to be even more disagreeable.

Realistic liberty and anarchy

Those who hold this realistic view of liberty are incapable of solving the dilemma raised by the demand both for freedom and for the other ends which the modern state may serve. They cannot reconcile authority with

liberty. Either one must surrender a portion of his freedom to do as he pleases or forego the benefits of a common rule of conduct which all concerned may be expected to observe. In the latter case there can be no organized efforts to promote the general welfare among a body of people except by voluntary co-operation. There can be no provision for the common defense except by voluntary enlistment in the armed forces and by voluntary contributions for their support. There can be no insurance against disturbance of domestic tranquillity among the body of people except that afforded by the strength and skill of each member for himself. In short, there is no foundation for the establishment of political or public justice. Private justice becomes identical with the interest of each individual, regardless of the interests of others except as they may serve his own. Every man becomes a law unto himself. He not only makes his own law, but also interprets it, when its meaning is questioned by others, and enforces it, when its authority is denied. He is at once lawmaker, policeman, judge, and executioner. In other words, those, who prefer doing as they please to enjoying the benefits which they might hope to receive by acknowledging the authority of a state, may secure that kind of liberty only by repudiating all political authority. Realistic liberty, as Godwin demonstrated, is logically compatible with nothing but anarchy.[1]

Not all, however, who have held a realistic view of liberty have been anarchists. Notable among those who

[1] See William Godwin, *Political Justice,* 1st edition, 1793. This once influential work, now remembered chiefly as the occasion for Malthus's famous reply setting up the "Malthusian" principle of population, is in fact one of the ablest productions of the English democratic school of political science. More scientific than Tom Paine, whose *Rights of Man* was so destructive to the prestige of Edmund Burke in America in the last years of the eighteenth century, Godwin is frankly incapable of reconciling freedom and government. Cf. H. N. Brailsford, *Shelley, Godwin, and Their Circle,* chapter IV.

Bentham's attempt to reconcile liberty and authority

have tried to build a theory of the state upon a foundation of freedom (in the realistic sense of the word) were the Utilitarians. Utilitarianism, as has been explained, was primarily a theory of justice. It accepted, as the test of right and wrong, the tendency of acts to increase pleasure or diminish pain. Each individual, Bentham thought, is the best judge of his own happiness and of the means by which it may be promoted. Hence, in general, the more nearly "free" individuals are to do as they please, the more likely that in the long run there will result the greatest happiness of the greatest number. Hence also "legislation should aim at a removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbor." Such was the foundation of the utilitarian political maxim that the liberty of each should be limited only by the same liberty for others. But this maxim did not mean that each should actually do as he pleased so far as was compatible with others doing as they pleased also. It did not mean, for example, that an automobilist on a public highway should be free to pass another automobilist either on the right or on the left as he pleased, provided that other automobilists enjoyed the same liberty. The inconvenience of negotiating a mutually satisfactory passage at every encounter was recognized by the Utilitarians. Their realistic view of liberty led them to an equally realistic view of the nature of authority.

Obliteration of distinction between liberty and servitude

In an organized state, according to Bentham's political philosophy, the individual's rights are all derived from the will of the sovereign. The subject has no rights which the sovereign is bound to respect. Conversely, on utilitarian principles, he has no obligations which he may not repudiate whenever he thinks it to his interest to do so. In other words, the early Utilitarians neither claimed a right to be free nor recognized a duty to obey. If the

subject obeys, presumably he prefers to obey rather than run the risks of disobedience. There is no reason for obedience apart from that arising from the calculation of the chances of happiness by obeying and by disobeying. But as long as one chooses to obey the rulers of his state, he remains as free as if he chose to disobey. The amount of liberty that should be granted to subjects, according to Bentham, was a matter of public policy rather than of private right. The civil or political state differed from the natural state only in so far as the existence of established rulers altered the circumstances under which the individual engaged in the pursuit of pleasure. The authority of the sovereign added one fact to be considered by the individual in deciding what he should do, but left him "free" to make his own choice. One who decides to obey the laws of the state because, on the whole, he thinks he will be happier for doing so is no less free than one who obeys the laws of nature for the same reason. In other words, according to the Utilitarians, a man's natural liberty to do as he pleases, and his civil or political liberty to obey the commands of his superiors, if he pleases, are of the same kind. Thus liberty was not reconciled with authority, but the distinction between liberty and servitude was obliterated.

Later empirical utilitarianism

Later Utilitarians were not satisfied with this solution of the political dilemma. It seemed to them a mockery to tell a man, constrained to obey an injurious law through fear of the penalties of disobedience, that he was free to disobey if he pleased, and that, if he chose under the circumstances to obey, obedience to such a law was liberty. The attempt to formulate a more satisfactory doctrine of liberty was made by John Stuart Mill, whose essay on that subject was regarded by himself as his masterpiece and by many of his followers as the final word on the subject. Mill defined liberty in substantially the same terms as

Bentham. "The only freedom which deserves the name," he wrote, "is that of pursuing our own good in our own way; so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it." Mill recognized more clearly than the earlier Utilitarians, however, the danger of tyranny by popular majorities in democratic states as well as by kings in monarchies. He valued more highly than they the dignity of the individual man and the opportunity of self-development for each according to his individual nature. The *Essay on Liberty* is a splendid plea for individuality as one of the principal elements of general well-being.

J. S. Mill's attempt to reconcile liberty and authority

Mill's solution of the dilemma of popular government is set forth in his discussion of the limits of the authority of society over the individual. "What then," he inquires, "is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin? How much of human life should be assigned to individuality, and how much to society?" His answer turns on his famous distinction between "self-regarding" and "other-regarding" acts. "Each will receive its proper share, if each has that which more particularly concerns it. To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society." From these propositions Mill drew the conclusion that as soon as any part of a person's conduct affects injuriously the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open for discussion. "But there is no room," he added, "for entertaining any such question when a person's conduct affects the interests of no person besides himself, or needs not affect them unless they like. . . . In all such cases there should be perfect freedom to do the action and stand the conse-

quences." Mill evidently intended to preserve the distinction between liberty and servitude, and to preserve a portion of liberty by surrendering the rest.

Uncertainty of boundary between liberty and authority

How much liberty does Mill succeed in preserving? In general, he recognized that everyone who enjoys the protection of society owes a return for the benefit, and that, since men do as a matter of fact live in society, each should be bound to observe a certain line of conduct toward the rest. But when he proceeds to assert that this conduct consists in not injuring one another's interests, he fixes a very uncertain boundary between liberty and authority. Upon Mill's principles may an individual plead his right to do as he pleases against an attempt by the state to prohibit, let us say, gambling? Mill would answer without hesitation, yes. The individual had a right to gamble, if he pleased, and run the risk of ruining his fortune, since, as Mill thought, no one's interests were injured except those of the gambler. But had a man a right to open a gambling house and invite others to gamble also? This question, Mill conceded, is not free from difficulty, and he evaded a direct answer, though he evidently was reluctant to sanction punishment for the gambling-house keeper when the gambler himself went free. But he declared himself strongly opposed to a general prohibition of the sale of intoxicating liquors, though he thought that any individual who, while intoxicated, committed a crime, might properly be restrained from becoming intoxicated again. Apparently the liberty to drink would be surrendered in this case upon the same theory which at common law entitles a dog to one bite and only requires that he be muzzled after he has had his bite.

Inadequacy of Mill's theory of liberty

It is evident that the distinction which Mill sought to make between self-regarding and other-regarding acts depends in each case upon the facts of that particular

case. There is no clear rule by which one may know in advance whether or not a Utilitarian like Mill would approve any particular restraint that might be proposed upon the conduct of the individual. There can be no clear rule upon his principles, because individuals will not agree upon the effects of other individuals' conduct. Some will say that no one is injured except himself by the debauchery of an habitual drunkard. Others will protest that his ruin can scarcely fail to injure at least his family and the local community of which he might have been a useful member. The boundary between liberty and authority becomes, therefore, a matter of opinion, and the circumstances under which authority is often invoked are such that opinions are certain to differ. Mill devotes a substantial part of his splendid essay to a discussion of the applications of his theory of liberty, but precisely how much liberty might be preserved upon his principles no man can confidently say.

Herbert Spencer's theory of liberty

The final attempt to salvage the realistic theory of liberty was made by the rational Utilitarian, Herbert Spencer. His logical mind easily exposed the fallacies of the empirical utilitarianism. The main business of life, he premised, is the struggle for existence, and the survival of the fit is impossible without injury to the unfit. The liberty of the individual, therefore, cannot be confined within the limits fixed by the desire of other individuals for protection against injury, without interfering with the progress of mankind and hence in the long run perpetuating the grossest injustice. So Spencer rejected Mill's idea that liberty must be associated with abstinence, either voluntary or enforced, from conduct which injures others, and revived the early utilitarian point of view. Spencer, like Bentham, regarded government at best as an evil and supportable only as the lesser among several evils. He did not actually say, as some so-called Liberals have said,

that that government is best which governs least. He had a theory concerning the true function of government, according to which a definite minimum of governmental activity was indispensable. But his idea of liberty was essentially the same as that of Bentham. "The liberty which a citizen enjoys," he wrote,[1] "is to be measured, not by the nature of the governmental machinery he lives under, whether representative or other, but by the relative paucity of the restraints it imposes upon him." The fewer the restraints, the greater the liberty. Perfect liberty, therefore, is the ability to do exactly as one pleases, or, more accurately, the complete absence of restraints imposed by external human authority. Spencer did not attempt to reconcile liberty with authority. Like Mill he thought that the individual should surrender a portion of his liberty in order to preserve the rest. But the portion which he thought the individual should surrender was determined on different principles, and much more definitely, than by Mill.

Freedom of contract

The sovereignty of the individual over himself should end, according to Spencer, and the authority of society should begin, at the point where the struggle for existence ceases to produce the approved consequences, the survival of the fit and the progress of mankind. Beyond that point an unregulated struggle, he feared, would be more likely to degrade than to elevate mankind. This point he fixed upon the boundary between what he called a militant and an industrial state of society. In a militant society the status of the individual is determined for him by the accident of birth or other circumstances beyond his control; in an industrial society the individual determines his place for himself by agreement with his fellows. In the militant society works of public benefit are accomplished by the forced labor of the masses; in the industrial,

[1] Herbert Spencer, *Man versus the State*, p. 93.

voluntary takes the place of compulsory co-operation for large-scale enterprises. The militant society is further characterized by the inequality of privileged classes; the industrial, by equality before the law. In general the characteristic of militant society is the organization of force and reliance upon authority; that of industrial, free competition and individual enterprise. Further progress, Spencer was convinced, must take as its point of departure the industrial state of society. The foundation, therefore, of the kind of social order which Spencer believed should control the future struggle for existence among civilized peoples is freedom of contract. The authority of the state, in his judgment, should be limited by the nature of the interferences with individual conduct which are necessary for the preservation of that kind of order. The true functions of an industrial state, he declared, are to repel foreign invasions, suppress domestic insurrections, and enforce the performance of contracts by penalizing their breach. Beyond these activities lies the province of the individual which the state must not enter. No other portion of liberty should be surrendered than that necessary and proper for the protection of freedom of contract. If only the sanctity of contracts is respected, the individual, as long as he refrains from acts of physical force and violence, should be free to injure his fellows as he pleases.

Comparison of empirical and rational utilitarian ideas of liberty

Spencer's idea of liberty was a great improvement over those of Bentham and Mill. It was more substantial than Bentham's, since the earlier Utilitarian, as has been shown, practically obliterated the distinction between liberty and servitude. Both Bentham and Spencer believed in the policy of *laissez faire;* but with Bentham *laissez faire* was merely a matter of policy, whereas with Spencer it was a matter of principle. It was more practical than Mill's, since, while Mill reserved a field of action within which the individual should be free to do as he pleased without

interference by the state, he could not locate definitely the boundaries of that field. According to Bentham, for example, the individual had no right either to gamble or to keep a gambling house, if the political authorities declared such conduct unlawful. According to Mill, the political authorities had no right to interfere with gambling, though whether or not they might properly interfere with keeping a gambling house he was uncertain. Spencer, on the other hand, was certain that the state had no right to interfere with any aspect of gambling except a breach of the gambler's obligation to pay his debts. Bentham made no distinction between legality and justice, and hence could recognize no justification except self-interest for resistance to the law. Mill distinguished between legality and justice, but, like Bentham, could recognize no justification except self-interest for resistance to law. Spencer also distinguished between legality and justice, but, unlike the others, could appeal from the law of the land to a higher law, that of natural selection and the survival of the fittest, a law, as he believed, dictated by the interests of no single individual but of all mankind. Above the laws of political states stood the law of nature. Above political justice and political liberty stood natural justice and natural liberty.

Revival of doctrine of natural rights

Spencer's idea of the state of nature was that of an omnipresent state in which natural law reigns supreme over the finite enactments of fallible men. It is not static, but dynamic; it is a condition of progress, not a vision of past or future perfection. As men become wiser, they gain a better understanding of the laws of nature and observe them more faithfully. "Along with social progress," he wrote,[1] "there goes not only a fuller recognition of these which we call natural rights, but also a better enforcement of them by the government. . . . The

[1] Herbert Spencer, *Man versus the State*, p. 15.

insuring to each individual the unhindered pursuit of the objects of life, within limits set by others' like pursuits, is more and more recognized as the duty of the state." He regarded freedom of contract as the most precious of natural rights and all interferences with it as obstructions of Nature's high purpose. He persuaded himself that the maker of any contract, regardless of its terms or the injury it might inflict upon others, had a right to demand its enforcement by the state. Nor had the state a right to interfere with any individual act, no matter how much it might injure the individual himself or others, provided it was not an act of physical force or violence. Ignorant parents should be free to bring up their children in ignorance or exploit their labor in factories and shops. Drug addicts should be free to poison themselves and ruin their families. Pimps and procurers should be free to batten on vice.

Impracticability of Spencer's theory of liberty

Spencer could persuade himself of all this because he believed that the natural state of civilized men was that which he termed an industrial society, and that the maintenance of such a state was the indispensable condition for further progress. But if, as a matter of fact, circumstances dictate the maintenance of a militant state of society, freedom of contract, upon Spencer's own principles, is inappropriate and cannot be a natural right. Its recognition must be deferred until some future age, when industrialism may safely be substituted for militarism by the progressive races of men. In the latter part of his life Spencer was discouraged by the persistence, and even increase, of what he termed state interference with individual liberty. He conceded that the natural condition of civilized men in the present age is not a purely industrial, but a partly industrial, partly militaristic society. "Why, then," he asked himself,[1] "enunciate and emphasize a

[1] Herbert Spencer, *Man versus the State,* Postscript, pp. 108-113.

theory at variance with the theory adapted to our present state?" And his answer was that "an ideal . . . is always needful for right guidance." Evidently, freedom of contract might become, but was not yet, a part of one's natural liberty. That particular state of nature in which men might be as free as Spencer wished them to be proves to be, after all, a vision of perfection. In reviving the ancient doctrine of natural rights, Spencer did not escape the ancient confusion concerning the state of nature itself.

The relation between liberty and justice

By reviving the idea of natural law, however, Spencer revived also the ancient notion that liberty consists in obedience to law and not in doing as one pleases. Bentham had tried to reconcile the two ideas of liberty by arguing that one is doing as he pleases when he obeys the law. His argument, however, was not convincing. Mill sought to escape the dilemma by steering a middle course between the view of liberty as the right to do absolutely as the individual pleases and that of doing absolutely as the authorities of the state please. But his course was too devious for other men to follow. Spencer chose the other horn of the dilemma, arguing that one is obeying the law, at least the natural law, when he does as he pleases. This argument, like Bentham's, is unconvincing. In a state of nature, since there is no organized body of people and no government, there is presumably a complete absence of restraints upon human conduct imposed by external human authority. The only human restraints upon individual conduct are those which men agree to willingly and abide by ungrudgingly, or which are imposed upon them by brute force. But even the strongest men are not free to do as they please. Their capacity for freedom is limited by their ability to do as they please. One cannot see in the dark, for instance, no matter how much one might be pleased to do so. One cannot treat one's neighbor as the mere instrument of one's own pleasure without provoking

resentment and incurring the risk of retaliation. Natural liberty may be enjoyed only within the limits fixed by the laws of nature. But what are those laws? Spencer thought he knew and upon that knowledge he built up his theory of justice. Other men have had different ideas of natural law, and consequently of justice. Spencer's idea of justice has already been examined and rejected. His idea of liberty must, therefore, be rejected also. Nevertheless, his argument has the great merit of emphasizing the inseparable connection between liberty and justice.

3

Reconciliation of liberty and authority by means of the social compact

The association of the ideas of liberty and justice was the great achievement of the social compact school of political philosophers. In the state of nature, according to their belief, the enjoyment of the blessings of liberty was associated with obedience to the laws of nature. The indispensable condition for the existence of liberty was the establishment of natural justice. In the political state, likewise, they believed there could be no liberty without justice. But different theories of justice were supported upon the same foundation—the original contract by which men were supposed to have transformed the state of nature into a political state. Along with those different theories of justice went corresponding theories of liberty. This was inevitable, partly because of the different purposes which political philosophers had in view, and partly because of the lack of definite knowledge about the state of nature. Hobbes, the first to make the social compact the foundation of an elaborate theory of justice and of liberty, was seeking to justify the authority of an absolute monarch such as Charles I tried to be in England. Locke sought to justify a limited monarchy such as was set up in England after the Revolution of 1688. Rousseau sought to justify a democracy such as the French Revolutionists

attempted to set up in 1793. None of them knew anything about the state of nature. Some of them, like Hobbes, did not pretend to know anything about it, but treated it as a convenient fiction for the purposes of their argument. Others fell back on their imaginations, when knowledge and logic failed them, and described the state of nature according to their fancy.

Natural liberty

It is to the poets, therefore, rather than to the political philosophers that one must look for the best pictures of the kind of freedom that was supposed to prevail in the state of nature. Dryden was one of the first to depict the poetic idea of natural liberty. He immortalized it in the oft-quoted lines of his "Conquest of Granada":

> I am free as Nature first made man,
> Ere the base laws of servitude began,
> When wild in woods the noble savage ran.

But Dryden's statement leaves much to be desired. It is not at all clear how much freedom the noble savage really enjoyed, though evidently Dryden believed his original state was better than that which was subsequently ushered in by the base laws of servitude. Pope in his "Essay on Man" was more precise.

> Nor think in Nature's state they blindly trod;
> The state of Nature was the reign of God:
> Self-love and Social at her birth began,
> Union the bond of all things, and of Man.
> Pride then was not, nor Arts, that Pride to aid;
> Man walked with beast, joint tenant of the shade;
> The same his table, and the same his bed;
> No murder clothed him, and no murder fed.

The state of nature and the Golden Age

Here we have the finished statement of the favorite theory of the eighteenth century, the identification of the state of nature with the Golden Age of the Greek and Latin poets. It must not be assumed that intelligent political thinkers like John Locke took these fantastic ideas

too seriously, but they did not hesitate to use them for their own purposes. In modern times, of course, the idea of a primitive Golden Age has been wholly abandoned. The current popular notion of the state of those who run "wild in woods" has been set forth most picturesquely by Rudyard Kipling, the poet of modern imperialism, in his "Law of the Jungle" in the *Second Jungle Book.*

Now this is the Law of the Jungle—as old and as true as the sky;
And the Wolf that shall keep it may prosper, but the Wolf that shall break it must die.
As the creeper that girdles the tree-trunk—the Law runneth forward and back—
For the strength of the Pack is the Wolf, and the strength of the Wolf is the Pack. . . .
Now these are the Laws of the Jungle, and many and mighty are they;
But the head and the hoof of the Law and the haunch and the hump is—Obey!

But Kipling's ideas are too advanced for the eighteenth century.

Hobbes's explanation of the exchange of natural for political liberty

The important fact about the state of nature was that by all accounts the natural man sooner or later had good and sufficient reason for extricating himself from it as best he could. The reasons advanced by different writers differed more or less but the effect was the same: natural men gave up their natural liberty, or some part of it, in order to secure the advantages of civil law and order. According to Hobbes, they gave up all their natural liberty and received in exchange a political liberty which was nothing other than the right to obey the will of the sovereign. Locke deemed such an exchange unreasonable, since the natural man received no fair equivalent for what he surrendered. The sovereign was not a party to the social compact, as Hobbes represented its terms, and the subject, therefore, remained in a state of nature with respect to his sovereign. In other words, he secured no rights

in exchange for what he gave up. He merely incurred obligations. He was bound to obey, but his sovereign was not bound to do anything. His fellow subjects, to be sure, bound themselves also to obey and that was the real consideration for his acceptance of the compact. But none of them received any guarantee that their sovereign would be mindful of their interests. They had merely the assurance that the sovereign would certainly look out for his own interests and they might venture to hope that their sovereign's interests and their own would coincide. If these hopes proved vain, the subject could not renounce his allegiance. He could only await the arrival of some new sovereign, more powerful than the old, to give him a change of masters. This was an idea of political liberty similar to that advanced by Bentham a century later, though encumbered with the magnificent fiction of an original compact. But Bentham had the grace to concede that the subject was at liberty to rebel, if he pleased, whereas Hobbes held him bound forever, in logic if not in fact, by the original compact. Such an idea of political liberty, Locke declared (as Spencer did later, after the same idea had been advanced by Bentham), was verily a confusion of liberty with servitude.

Locke's version of the social compact

A more reasonable form of social compact, according to Locke, would lead to a very different result. By his version of the compact the individual did not surrender all his natural rights, but only that portion of them necessary to procure in exchange the exact amount of political authority required to correct the defects of the state of nature. What, then, were those defects? Locke answers carefully. In a state of nature man has liberty "to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of nature," and also "to punish the crimes committed against that law." Trouble arose through (1) the uncertainty of

natural law, (2) the absence of any duly authorized judges to declare its meaning in doubtful cases, and (3) the absence also of any body regularly appointed to execute the law. Where each individual had to take the law into his own hands, might, not right, tended to prevail. By the social compact, therefore, men form a civil state and agree to submit to its authority, in order that they may enjoy the protection of known laws, and obtain the services of regular judges and executives. By the exchange of the natural for the civil state, first, their natural liberty is "in many things" confined, and secondly, the liberty to punish offenders against the laws of nature is wholly surrendered. But the legislative power of the civil state is granted not only for definite purposes but also upon definite conditions. These are four in number: (1) All political authority must be exercised for the public good; (2) legislative power must be exercised by fixed and known laws; (3) there must be no taxation without representation; and (4) there must be no delegation of legislative powers to non-legislative bodies. To Americans these conditions have a familiar sound. Alleged violations of one or more of them were frequently cited by the colonists in justification of the American Revolution. According to Locke, a violation of any one of them was in effect a violation of the social compact itself, and restored to the individual the full measure of his original natural liberty.

The right of revolution

The individual under Locke's version of the social compact was also entitled to resist the government of the state without destroying the state itself. The conditions upon which the individual may do this Locke was careful to define with a great show of precision. In the first place, the subject might always resist a tyrant who resorted to force. "Wherever law ends, tyranny begins," Locke declared, "if the law be transgressed to another's harm."

The subject might also resist his lawful sovereign under certain other conditions, which Locke specified as follows: (1) If the king should act without authority of law; (2) if he should prevent the legislative branch of the government from meeting in order to rule alone; (3) if he should alter the mode of electing the people's representatives so as to destroy their representative character; and (4) if he should surrender the people to a foreign power. Finally, the people may always overthrow the government, when able, if either the king or their representatives are guilty of a breach of trust, and of such guilt the people must judge for themselves. These theoretical grounds for renouncing allegiance to the sovereign are strikingly similar to the actual grounds upon which the Convention Parliament in 1688 deposed King James II. Indeed, Locke's whole treatment of his subject suggests the modern lawyer's trick of asking a hypothetical question, involving all the facts of a real case, in order to secure the admission of the expert witness's answer to the issue in the real case. But the conditions upon which Locke justified resistance to political authority are of less importance to-day than the light his theory of rebellion casts upon his idea of liberty. So long as the established rulers exert their proper authority by due process of law, according to his theory, the rules of conduct which they enforce are identical with justice. Obedience to such authority, he concluded, is no abridgment of liberty.

The concept of due process of law

Thus Locke associated the idea of liberty not only with that of justice, but also with the concept of due process of law. This was his great advance over Hobbes. Both of them sought to identify justice with the interests of the whole body of people. But Hobbes proceeded to exclude the sovereign from the obligation of submission to the law, and succeeded in justifying, if anything, the most arbitrary conduct of public affairs. In practice, his theory

offered little security for the establishment of justice or the maintenance of liberty. Locke, on the contrary, insists upon the supremacy of the law over the whole body of people, including the legal sovereign, and refuses to recognize as binding upon the people such acts of authority as do not satisfy the requirements of the accepted processes of government. Those processes might be formally established by a solemn written covenant.[1] More often the consent of the people would be implied from their general disposition to observe their obligations. Locke's theory, like Hobbes's, may be discounted as a special plea for a particular occasion. But it strongly influenced the ideas of Englishmen down to the time of the French Revolution, and in America it furnished the basis of the political philosophy of the "Founding Fathers." When Jefferson wrote into the Declaration of Independence the immortal claim to an "inalienable right" to liberty, the kind of liberty he had in mind was that defended by John Locke. Locke's definition, however, had been simplified by another Englishman, the celebrated lawyer, Sir William Blackstone, whose *Commentaries on the Laws of England* appeared just long enough before the American Revolution to give the colonists a much more accurate notion of the real nature of an Englishman's liberty than they could ever have gained from general definitions alone. "Political liberty," Blackstone wrote, "is no other than natural liberty so far restrained by human laws, and no further, as is necessary and expedient for the general advantage of the public." This may be accepted as the best short statement of what the general term "liberty" meant to the authors of the Declaration of Independence.

Blackstone's definition of liberty

The theory of liberty which Americans owe to Locke and Blackstone possesses certain incontestable merits. It

[1] See Preamble to the Constitution of the Commonwealth of Massachusetts, adopted in 1780.

Merits of this idea of liberty

recognizes that liberty cannot be separated from justice, and that both are dependent upon the existence of appropriate forms and processes of government. It recognizes also that the individual cannot be wholly absorbed into the state and delivered over to the mercy of the sovereign. The state is merely one, though the most important, of the several kinds of human association, and the authority of its rulers is limited by the nature of political affairs. It is also limited by the nature of man himself and cannot be successfully invoked in that field of action in which the individual is conscious of no social interest.

Its limitations

But in the attempt to put these general ideas into explicit terms, Locke became involved in some obscurity and in considerable confusion of thought. For example, he could distinguish between the overthrow of the government and the dissolution of the civil state itself because he made a distinction between two stages in the social compact, the *pactum unionis,* by which the state comes into existence, and the *pactum subiectionis,* by which the organized people provide themselves with a government. The first stage of the compact proceeds by unanimous consent; the second is accomplished by the will of the majority. Presumably also, though Locke does not make this altogether clear, it is the majority that is to judge of breaches of trust by the government and to sanction its overthrow when necessary to preserve the liberty of the people. One may inquire, Whence does the majority derive such power? Locke's answer is unaffectedly simple and artless. He bases it on the argument of convenience. No other course is practicable, he confesses, than that the majority should rule at that stage of the proceedings. The majority, however, being rational creatures, will not continue to rule their commonwealth. Locke and Blackstone had no love for "pure" democracy. They will promptly set up, we are assured, some such

form of government and process of law as the English actually secured by their "great and glorious revolution." Thus civil or political liberty in general is identified with the particular liberties of Englishmen under the first two Georges and the Whig aristocracy. Those liberties were real and substantial, no doubt, as Montesquieu attests, but they did not embody the whole idea of liberty.

Rousseau's version of the social compact

The man who gave to the idea of liberty its final form, so far as the social compact school of political philosophers was capable of doing so, was Rousseau. His ideas on the subject seem to have been a blend of those of Locke and of Hobbes. He held with Locke, that liberty cannot be separated from justice, and that both are dependent upon the existence of appropriate forms and processes of government. He held with Hobbes that the power of the sovereign, regarded as the source of law, must be unlimited and absolute. In order to reach these conclusions, it was necessary to devise a new theory of sovereignty. He could not agree with Hobbes that the sovereign was a particular person with a will of his own not subject to the authority of law. He could not agree with Locke that the sovereign was subject to the authority of law but without any definite personality of its own. Rousseau's sovereign was neither a king by divine right nor a king-in-parliament by authority of law. If the people were to be really free, they must obey none but self-prescribed laws. If the sovereign power is to be both real and general, it can be nothing else but the will of the people themselves. The general will of the people could be directed to no object but the general interests of the whole body of people, and the individual who obeyed the commands of such a sovereign would be far safer than he could ever hope to be, if dependent upon his own unaided efforts as in the theoretical state of nature. So Rousseau worked out a third version of the social compact. His purpose was primarily to show how

political authority might be justified. Incidentally, he supplied a new definition of liberty.

The sovereignty of the general will

The "problem of which the social compact is a solution" Rousseau stated thus: "To find a form of association which protects with the whole common force the person and property of each associate and in virtue of which everyone, while uniting himself to all, only obeys himself and remains as free as before." The terms of the compact, according to which Rousseau solved this problem, are as follows: "Each of us throws into the common stock his person and all his faculties under the supreme direction of the general will; and we accept each member as an inseparable part of the whole. . . . There results from this act of association, in place of the several persons of the several contracting parties, a collective moral body, composed of as many members as there are voices in the assembly, which body receives from this act its unity, its common self, its life, its will. . . . It is called by its members a *state* when it is passive, a *sovereign* when it is active, a *power* when compared with similar bodies. The associates are called collectively a *people,* severally *citizens* as sharing in the sovereign authority, *subjects* as submitted to the laws of the state." Thus the idea of sovereignty is merged into that of the state itself. The consequence is that the people may be placed under obligations to the sovereign, but the sovereign cannot incur any obligation toward itself, since it cannot make any law which it cannot cancel. This sounds like Hobbes. Nevertheless, there is no need to limit the sovereign's powers in the interest of the people, as Locke had argued, since the sovereign body, being formed of the very individuals who are the people, can have no interest contrary to theirs. The individual secures his liberty by the same act that establishes justice. By obeying the general will he enables himself to be free, or, if he refuses to obey

the general will, the government may force him to be free.

The general will and the will of the majority

Rousseau's assertion that the individual may be forced to be free seems a contradiction in terms. He himself was aware that the paradox required further explanation. The social compact itself rests, of course, upon unanimous consent. Those who refuse to consent can not invalidate the compact: they are merely not bound by it. They are foreigners among citizens. After the adoption of the original compact, the vote of the majority, according to Rousseau, "always binds all the rest." This follows, he asserted, from the compact itself. But it may be asked how a man can be both free and forced to conform to wills that are not his own. How are the opponents of a law at once free and at the same time bound to obey what they have not agreed to? Rousseau's answer is that the question is wrongly put. "The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them. . . . When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When, therefore, the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so." Consequently, the citizen who refuses to abide by the result of the popular vote, because his private opinion of the general will differs from that of the majority of his fellow citizens, is the one who is really unfree. Thus Rousseau reconciles the general will with that of the majority.

Rousseau was not blind to the possibility of confusion

Practical dependence of liberty upon the disinterestedness of the majority

between the will of the majority and the general will. His critics, indeed, have said that he did confuse the two, since, through the subterfuge of a general will, the majority apparently would be able to force their private opinions upon the minority. His conclusion that the member of the minority who obeys the law, as declared by the majority, is as free as any of the majority themselves presupposes, he confesses,[1] "that all the qualities of the general will still reside in the majority; when they cease to do so, whatever side a man may take, liberty is no longer possible." In other words, it presupposes that the majority are single-minded in their purpose to promote the general welfare and are not in the least actuated by a desire to advance their own special interests at the cost of the rest of the community. If the majority are in fact pursuing their own private interests, liberty no more exists for the members of the minority who are bound to obey the decision of the majority than for those who might be subject to the authority of the sovereign in Hobbes's *Leviathan*.

But is there greater security that the majority will subordinate their private interests to those of the public than that a single arbitrary ruler will do so? Rousseau evidently had his doubts upon this point. He admits that it will be necessary to determine variously the proportion of the votes requisite for declaring the general will. The graver and more important the question discussed, he states, the nearer should the opinion that is to prevail approach unanimity. The more the matter in hand calls for speed, the smaller the size of the majority may be allowed to become. Where an instant decision is to be reached, a majority of one vote should be enough. Thus the theoretical sovereignty of the general will is transformed into the actual rule of the majority, sometimes, to

[1] See *The Social Contract*, book IV, chapter III.

be sure, a large majority, again a bare majority of one. Upon the benevolence of that majority, according to Rousseau's version of the social compact, the liberty of the individual ultimately depends.

Revolutionary character of Rousseau's theory of governmen

Rousseau's extraordinary confidence in the disinterestedness and good intentions of the multitude is the secret both of the success and of the failure of his political ideas. The *Contrat Social* became one of the most successful of political writings or, as a hostile critic has said, one of the most fatal of political impostures, because, at a time when the masses of the people could put little faith in princes, it encouraged them to put great faith in themselves. It was this superlative confidence in the people that made Rousseau, rather than Locke or other earlier exponents of the social compact theory of the state, the idol of revolutionary democracy in the nineteenth century. Locke had not much more faith in princes than Rousseau, but he would have regarded Rousseau's deification of the people with almost as much dismay as the royalists' deification of kings. Locke, like Rousseau, put his trust in popular majorities, but only for special purposes on the most extraordinary occasions. Once the majority set up a government, the part he would have them play therein is small enough. Rousseau gives them the leading rôle. He agreed with Locke that governments derive their just powers from the consent of the governed, but went beyond him in believing that that consent must be frequently and publicly expressed. He agreed with Locke that rulers have no other title to their offices than that conferred by the people, but again went beyond him in believing that the people must confer that title explicitly and directly at frequent elections based on a universal and equal franchise. These conditions were not altogether satisfied by any of the governments of his time. Tried by his principles, most of them were seriously defective. Even in

England, where upon Locke's principles liberty was most secure, the people, who had little to do with the conduct of affairs of state except to vote at intervals for members of the House of Commons, enjoyed no liberty whatever, Rousseau thought, except at the moment of voting. And everywhere, he insisted, men should become free.

Defective psychological foundation of Rousseau's theory of government

But when men obtain a form of government which upon Rousseau's principles should secure the blessings of liberty, the question remains to be answered, how will the majority actually use its power? Rousseau's only answer was, as has been said, that, if the majority should not use it disinterestedly for the good of all, the blessings of liberty would not be secured. Presently along came the Utilitarians and averred that, as a matter of fact, men are primarily interested in themselves, and the majority must be expected to use its power mainly for private ends. Against Rousseau's faith in the reality of the general will, Bentham set up his faith in the rationality of individual self-seeking. Faith in the natural benevolence of popular majorities was matched by faith in the beneficent operation of enlightened selfishness. Both Rousseau and Bentham favored majority rule, but upon opposite and mutually exclusive grounds. In practical politics the ideas of both served the purposes of the rising tide of democracy. But in the field of political philosophy they helped to destroy one another. Each built his theory upon a view of human nature, and both of those views could not be true. Bentham's can no more be reconciled with Rousseau's, than Hobbes's natural and brutal man can be identified with the radiant creature of Pope's Essay. Doubtless the truth lies altogether with neither, and the extent to which the people of a particular state will be influenced by selfish considerations and by a regard for the welfare of the community as a whole is a matter of fact to be determined by experience and observation, not by any process

of general reasoning. It was the logic of events which in the end demonstrated the futility of the fiction of an original compact. When it became possible, as in France in 1793, to try to reorganize a state on the principles of the *Contrat Social,* it became evident that human nature remained as before, and that the new sovereign was a creature of similar temper to the old. The immediate effect was to produce a reaction against excessive confidence in the will of majorities. The ultimate effect was to bring out more clearly the fundamental truth which Rousseau borrowed from Locke. The blessings of liberty cannot be secured merely by obedience to law, not even when the law is made in the name of the people. It is necessary, also, that the law be made by a suitable process. This fundamental truth cannot be obscured by the fact that Locke and Rousseau did not agree concerning the nature of a suitable process. The discovery of the right process remains, indeed, the central problem of modern political science.

The fundamental truth which it contained

The plastic fiction of a social compact led, in the hands of men so unlike as Hobbes, Locke, and Rousseau, to the most contrary conclusions. Rousseau's version supported a theory of sovereignty, which Hobbes might have claimed as his own, and a theory of government, which he would have condemned as little better than anarchy. It was compatible with a general view of the nature of justice and liberty, which is essentially the same as Locke's, and a theory of government, which Locke would have condemned almost as passionately as Hobbes. Hobbes's version was designed to support the doctrine that men have no right to make a revolution against an established sovereign, but, as Locke pointed out, you may cry up a sovereign as you will, men will still revolt if they find his rule intolerable. Locke's version was designed to justify the particular revolution which Englishmen made in 1688,

The futility of the fiction of a social compact

but it is difficult to see how he can justify that one without also justifying many others. Rousseau's version more logically justifies every revolution, where the rulers have used their power unjustly. Because there has been so much injustice in modern states, Rousseau's influence has been destructive rather than constructive. But it is probable that that was not his own expectation. Be that as it may, the fiction of a social compact has played a great part among the political ideas of modern times. It led to no conclusion, however, which cannot be attained without it.

The importance of the idea of a reign of law

The fiction has served a useful purpose, nevertheless, in familiarizing men with the idea of an impersonal reign of law instead of the arbitrary sway of personal sovereigns. This idea, combined with that which justifies the law by its services to the community as a whole, is the foundation of modern liberty and constitutional government. The interest of the successive generations of men in the reconciliation of liberty with authority varies. At one time circumstances require that the claims of authority be vindicated. Again, men become more vitally interested in that continuous possibility of personal initiative which, as Graham Wallas has pointed out,[1] men often vaguely mean by liberty. But the two are merely different aspects of the same interest of mankind. The practical opportunity which men have of exercising their faculties and fulfilling their desires can reach a maximum only when they are capable of accomplishing the purposes for which the true commonwealth exists, as well as those which each might accomplish well enough for himself, if no state existed. The right of the individual to do as he pleases, therefore, may properly be limited in order to secure the legitimate ends of the state; and such limitations are the necessary condition for the existence of political liberty. But the

[1] Cf. *The Great Society,* p. 358; *Our Social Heritage,* chapter VII, *passim; The New Statesman,* September 25, 1915.

activities of the state must be kept within their proper limits also. The problem of liberty is not soluble by any kind of fiction, but only by the actual establishment of justice through the efforts of rulers who exert their authority in accordance with due process of law. If the justice so established stands the test imposed by the idealistic theory of justice, the liberty which is secured by obedience to the law must also be identical with the interests of the whole body of people. Whether such liberty is actually attainable in any state is a problem of practical politics. It was at all events the kind of liberty which the "Founding Fathers" sought to secure under the Federal Constitution of the United States.

Reconciliation of liberty with obedience to just laws

The idealistic theory of liberty holds that the right to do as one pleases is a part of one's liberty only in so far as it is compatible with the establishment of justice through the reign of law. Ritchie, the able author of an instructive book on natural rights,[1] has argued that the denial by the government of the United States of the right claimed by the Mormons to practice polygamy was a violation of the liberty of the Mormons. He suggested that the proper way to have discouraged polygamy, since it was so offensive to the sentiments of the bulk of the American people, would have been to deny to plural wives the protection of the laws against desertion and non-support and to their children the protection of the laws regulating the distribution of property among legitimate descendants, without making plural marriages contracted on religious grounds criminal at law. Then Mormon men and women would have been "free" to engage in polygamous marriages upon condition of assuming the risks of legally unsanctioned unions. But the Congress of the United States took the view that marriage, being a temporal as well as a spiritual relation, is properly subject to the

The idealistic theory of liberty

[1] David G. Ritchie, *Natural Rights* (London, 3rd edition, 1916).

authority of the state, and that justice for the people as a whole required the abatement of a practice which most of them regarded as a nuisance and a menace. There can be no question of the justice of the particular action which Congress took, whatever may be thought of its expediency, without questioning at the same time their authority to act in any manner in such a case, even in the manner suggested by Ritchie. The Mormons may have been displeased, but, assuming that the government of the United States acted within its jurisdiction, they remained as free as before, unless they could show that the government was so organized and its processes were such that just laws could not be expected to come out of it.

Individual liberty and corporate liberty

What is true of the liberty of the individual is equally true of the liberty of the church, of the racial or cultural group, of the social or economic class, of the professional association or labor union, and of the various other kinds of non-political organizations to which men belong. The maintenance of proper relations between these and the state is merely one form of the general problem of liberty. The conflict of interests between ecclesiastical and political bodies, or between economic and political bodies, reflects the conflicts of interest within the individual himself. Conflicts of a purely personal character he must settle for himself. He must decide, for example, how to apportion his income between food and clothing and shelter, although the state can help him reach a wise decision by supplying him with information and, in certain cases, with advice. It is only when there is not enough food, or clothing, or shelter, to go around, as may happen in time of war or other public distress, that a social interest develops in such decisions. Then the individual is concerned, not only with his own decision, but also with the decisions of others. The adjustment of conflicting interests in such cases becomes a function of government. The process of adjustment must

be such that each interest is duly considered. Justice not only, but also liberty, is the product of the process. The security for both is the nature of the process. It is the same also in the adjustment of the relations between the various forms of human association; that is, between various kinds of social interests. The adjustment of their interrelations is a function of government, and the equilibrium between them must be established by law. The security for religious liberty, or for cultural liberty, or for economic liberty, is not a denial of the competence of the state, but due process of law. After all, it is not primarily the interests of ecclesiastics or labor leaders or any other particular kind of human authorities that are at stake; it is the various social interests of the people themselves.

Corporate liberty and social justice

Some learned and ingenious writers, notably Figgis[1] and Laski,[2] who have been much concerned to define the limits of authority between the state and the church or the labor organization, have confused the rights of the respective authorities with those of the people themselves. A church which could define the legal relations between ecclesiastics and statesmen would be more than a church; it would be a church-state. A labor union which could define the legal relations between its leaders and the government would be more than a labor union; it would be a labor-state. Under the proper conditions such kinds of states would be desirable. But the proper conditions are not the existing conditions. The problems of justice and liberty involve the taking account of existing conditions in actual cases, and merge at last into the fundamental problem of government itself, its organization and procedure.

The political thinker who in modern times most clearly

[1] J. N. Figgis, *Churches in the Modern State.*
[2] H. J. Laski, *Authority in the Modern State.*

Montesquieu's statement of the idealistic theory of liberty

indicated the true nature of liberty was the wise French jurist, Montesquieu. Equipped with a fairer understanding of human nature and a wider knowledge of history than his contemporaries of the social compact school of political philosophy, he did more than any other man, despite his defects of information and faults of method, to restore the study of politics to a place among the sciences such as it enjoyed in classical antiquity at the hands of Polybius and Aristotle. Liberty, he declared, does not consist in doing what one pleases but as one ought.[1] The evidence that it is secure is a feeling of safety and tranquillity such as can never be enjoyed by those who give a loose rein to impulse and instinct. Montesquieu's concern was not so much with the theoretical nature of liberty as with the actual processes by which laws are made and justice is administered. His observations convinced him that the greatest liberty in his day existed in England, and was a consequence of the structure of the government and the division of powers among its several departments. His careful studies thus led him to the same conclusion that Locke reached by speculative reasoning and Blackstone through the lawyer's professional deference for the institutions under which his country had grown great. It was such considerations as Montesquieu's that chiefly influenced the "Founding Fathers" when, having won their fight for the independence of the united colonies, they wished to organize a durable union of the whole body of people. In the Federal Constitution of 1787 there is no talk of natural rights or social compacts. There was enough of that in the original State constitutions. In 1787 men were interested in justice and liberty with the emphasis on the justice as well as on the liberty. To secure the blessings of the latter, they knew that it was equally necessary to establish the former. In the last analysis these two of the

[1] Montesquieu, *L'Esprit des Lois*, book XI, chapter III.

ends for which the people ordained and established the Constitution are one and inseparable.

Final definition of the liberty which is sought by the people of a commonwealth

Liberty, as the word is used in the Preamble to the Federal Constitution, may best be defined as the absence of arbitrary human restraints upon personal conduct; that is, restraints other than those imposed by authority of just laws. Obedience to just laws is not only not incompatible with the enjoyment of the blessings of liberty: it is an essential part of it. The enforcement of just laws is, indeed, the means of securing liberty, since it is the condition upon which, other means failing, the individual accomplishes those of his purposes which require for their consummation the assistance of others. It may be suggested that obedience is not quite the right word to express the relation between the individual and the laws of a state where justice prevails. If the laws are just, their observance by the members of the state is in effect a form of collaboration or co-operation in the accomplishment of their common purposes. The conflict of authority between the individual and the state is only apparent. The real conflict is that between those interests of the individual which are peculiar to himself and those which he shares with others. It is fundamentally a conflict between the purely personal and the social interests of the individual. A man has a personal interest in the slaking of his thirst. He has a social interest in the practice of temperance in his community. The man who is restrained from drinking intoxicating liquors by a conviction that it will be injurious to him is no more free than the man who is restrained from the same act by a law of his state, to which he has given his consent. That is plain enough. The man who drinks liquor, not being convinced of its injurious character, when there is no law against it, is also no more free than the same man when restrained by law, provided that it is a just law. The establishment of

justice is the foundation of liberty in all things in which men have a social as well as a purely personal interest. This is the aspect of liberty which is misunderstood by those who hold a "realistic" view of its nature. But it is essential that the law be just, as justice has been defined by the political idealists. The nature of justice has been discussed elsewhere. It is enough to point out here that the law may be just, although particular individuals fail to recognize its justice.

Political liberty and moral liberty

The idealistic view of political liberty, embodied in the Preamble to the Federal Constitution, is closely related to the idea of moral liberty. It is not a liberty always to do as one pleases, but rather to do as one ought. The kinship between this view of political liberty and moral liberty is well illustrated in the little speech on liberty pronounced by John Winthrop before the Massachusetts General Court in 1645. Winthrop's definition of liberty accurately reflected the preponderant opinion in the Puritan Commonwealth and was reverently cherished by later generations of Americans. It was reported to the eminent French Liberal, Alexis de Tocqueville, and recorded by him with the highest praise in his illuminating account of American democracy in the early nineteenth century. "For the other point concerning liberty," Winthrop had said,[1] "I observe a great mistake in the country about that. There is a twofold liberty, natural (I mean as our nature is now corrupt) and civil or federal. The first is common to man with beasts and other creatures. By this, man as he stands in relation to man simply, hath liberty to do what he lists: it is a liberty to evil as well as to good. This liberty is incompatible and inconsistent with authority, and cannot endure the least restraint of the most just authority. The exercise and maintaining of this liberty

The opinion of John Winthrop

[1] Alexis de Tocqueville, *Democracy in America* (Bowen's edition, Vol. I, pp. 52-53.

make men grow more evil, and in time to be worse than brute beasts. . . . The other kind of liberty I call civil or federal. . . . This liberty is the proper end and object of authority, and cannot subsist without it; and it is a liberty to that only which is good, just, and honest. . . . This liberty is maintained and exercised in a way of subjection to authority; it is of the same kind of liberty wherewith Christ hath made us free."

Political liberty and constitutional liberty

For the conclusion that the idealistic theory of liberty indicates the kind of liberty sought by the "Founding Fathers" we have the high authority of the foremost of the Fathers himself. In his Farewell Address Washington writes: "Respect for its [that is, the Government's] authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true Liberty. The basis of our political systems is the right of the People to make and alter their Constitution of government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all. The very idea of the power and the right of the People to establish Government, presupposes the duty of every individual to obey the established Government." Thus we are brought back to the first and greatest truth of political science. "In democracies of the more extreme type," Aristotle observed in the fourth century before Christ,[1] "there has arisen a false idea of freedom which is contradictory to the true interests of the state. For two principles are characteristic of democracy, the government of the majority and freedom. Men think that what is just is equal; and that equality is the supremacy of the popular will; and that freedom and equality mean the doing what a man likes. In such democracies everyone lives as he pleases, or in the words of Euripides, according to his fancy. But this is

The opinion of Washington

The opinion of Aristotle

[1] Aristotle's *Politics*, book v, chapter ix, §§ 14-15.

all wrong; men should not think it slavery to live according to the rule of the constitution; for it is their salvation."

The idealistic vs. the realistic theories of political liberty

Both Washington and Aristotle were assuming, however, that the rule of the constitution was, or might be, a rule of just laws. Otherwise submission to its authority would not secure the blessings of the kind of liberty they had in mind. This is the point at which the political realist and the political idealist must finally agree to disagree. The political realist is frankly skeptical of the practicability of identifying justice in any actual state with the interest of all its members. He asserts that justice as a matter of fact serves primarily the interests of the ruling part of the state and only remotely, if at all, the interests of those with little or no direct share in the governing power. Under such circumstances, they say, the vision of the "Founding Fathers" is only an iridescent dream, a misleading mirage, which may blind some of the ruled to the true character of their state, but cannot deceive those who really understand the nature of politics. Practical men, they insist, will adhere to the view of liberty which political idealists are bound to admit is widely entertained. In common usage, as Graham Wallas has correctly stated,[1] liberty generally means a condition in which human impulses are not obstructed, and, as a rule of political conduct, the doctrine that such obstruction should not take place. Political idealists will further admit that in the inferior types of states this is the only kind of liberty that the common man may be expected to enjoy in default of a supply of benevolent despots, and that even in the modern commonwealth it may often seem to be the most substantial liberty that is attainable. In the light of these facts the tenacity with which realistic theories of liberty are often held by the common man, as well as by many of the political philosophers, is easy to understand.

[1] Graham Wallas, *Our Social Heritage,* p. 159.

The opinion of Lincoln

It was this common usage which Lincoln had in mind when he said:[1] "The world has never had a good definition of the word 'liberty.'" Continuing, he added: "We all declare for liberty; but in using the word, we do not all mean the same thing. With some, the word 'liberty' may mean for each man to do as he pleases with himself and the product of his labor; while with others, the same word may mean for some men to do as they please with other men and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny. The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act as the destroyer of liberty." There lies the fundamental defect of every realistic theory of liberty.

The ultimate problem of right government

No solution of the dilemma is possible which does not explain the liberty which the people of a commonwealth seek in terms of social, not individual, interests, and of public, not private, purposes. But how shall social interests be ascertained and public purposes declared? This is the problem which the political idealist has to solve. It is a problem of governmental forms and processes. It is a problem of making just laws. How in practice shall the law be made just, as the political idealist defines justice? Or must the law, as the realist asserts, inevitably serve the private interests of the rulers of the state and of their friends and followers? If the question, how is the government of a commonwealth rightly constituted, cannot be answered, the idealistic theories of justice and liberty can have no practical significance, unsatisfactory as the realistic theories may be. An idealistic theory may express the

[1] A. Lincoln, Address at a Sanitary Fair in Baltimore, April 18, 1864.

aspirations of enlightened men, but realistic theories alone will explain the kinds of justice and liberty that political states actually afford.

NOTES ON BOOKS

1. See L. T. Hobhouse's *Morals in Evolution* (2 vols., 1906).

2. In addition to the books already noted, especially those noted in the preceding chapter, see B. Russell's *Proposed Roads to Freedom; Socialism, Anarchism and Syndicalism* (1919). A convenient edition of Mill's *Liberty,* useful also for its introduction, is that in the Everyman's Library (ed. by A. D. Lindsay). This volume contains also his essays on *Utilitarianism,* and on *Representative Government.*

3. The most significant passages from the writings of Hobbes, Locke, Rousseau, and Montesquieu are reprinted in F. W. Coker's *Readings in Political Philosophy* (1914). Locke's *Second Treatise of Government* (1690) and Montesquieu's *L'Esprit des Lois* (1748), contributed most to the American belief in the importance of the forms and processes of government for the security of the blessings of liberty. See F. Lieber's *Civil Liberty and Self-Government* (1853; T. D. Woolsey's 3d ed., 1874, is the best). But the Founding Fathers made a thorough study of the science of government. See, for example, C. M. Walsh's *The Political Science of John Adams* (1915). For much judicious, though scattered, comment on the theory of liberty, see *The Federalist* (the best edition is P. L. Ford's, 1898). The limitations of the doctrines of natural rights and of the social compact, whether utilized to support a realistic or an idealistic theory of justice and liberty, have been discussed by many writers, notably by D. G. Ritchie in his *Natural Rights* (3d ed., 1916). The best account of the development of the political ideas, underlying the American philosophy of liberty, is L. Stephen's *History of English Thought in the Eighteenth Century* (2 vols., 3d ed., 1902).

CHAPTER VIII

DOMESTIC TRANQUILLITY

1

BESIDES the realistic and idealistic philosophical meanings of liberty, the word has a juristic significance which is different from either. This is evident from its use in the Constitution of the United States, where it appears not only in the Preamble but also in the Fifth and Fourteenth Amendments. The former, adopted in 1791, was designed to protect the individual against oppression by the government of the United States, and contains the provision that no person shall be deprived of life, liberty, or property without due process of law. The latter, adopted in 1868, was designed to protect the individual against oppression by the States, and contains a similar provision. Concerning the meaning of liberty, as used in these two amendments, there have been several radically different opinions. These differences of opinion have led to a great deal of discussion in American politics and to a great many actions in the courts of law. Sometimes one opinion has tended to prevail in the halls of legislation and in the decisions of the courts, sometimes another. The reasons for the fluctuations of opinion on the part of the authorities, and the consequences thereof in the conduct of public affairs, are an important matter for consideration in any study of constitutional government in the United States. First, however, it is necessary to inquire, what the different opinions are, and, if possible, to determine which is correct.

Juristic meaning of liberty

Liberty, as a general term in English law, means a privilege held by royal grant or prescription. This is the

(1) General meaning: privileges and immunities

sense in which the term is used in *Magna Carta,* the Great Charter of the Liberties of Englishmen. The first article, for instance, provides that the Church of England shall have "her whole rights and her liberties inviolable." The second confirms the grant "to all the freemen of our kingdom" of "all the underwritten liberties, to be had and holden by them and their heirs, of us and our heirs, forever." And the sixtieth confirms the benefits of the Charter, not only to the greater clergy and barons who had extorted it from a reluctant king, but to all the English people. "All the aforesaid customs and liberties, which we have granted to be holden in our kingdom, as much as it belongs to us, all people of our kingdom, as well clergy as laity, shall observe, as far as they are concerned, towards their dependents." The term is used in the same sense in the Petition of Right of 1628, the full title of which is, "The Petition exhibited to His Majesty by the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, concerning divers Rights and Liberties of the Subject." It is used in this sense also in the Bill of Rights of 1689, the title of which is, "An Act for declaring the Rights and Liberties of the Subject," etc. It is used in this sense finally in Blackstone's *Commentaries on the Laws of England,* published on the eve of the American Revolution, the work from which the Colonists largely obtained, not only their knowledge of the rights of Englishmen, but also their definitions of legal terms. This is the settled meaning of the word, liberty, standing alone without any qualification, expressed or implied, as used by English lawyers throughout the period since the liberties of Englishmen were first put down in writing.

An Englishman's liberties, therefore, are a determinate body of ancient legal privileges, which have "broadened down," as Tennyson finely said of the whole body of Eng-

lish law, "from precedent to precedent" and become constitutional rights of to-day. They are all susceptible of precise definition. Blackstone treated the subject under the heading, "The absolute rights of individuals," which, he added, "are usually called their liberties." He divided these rights or liberties into two classes, primary and secondary. The primary rights are three in number: the right of personal security, the right of personal liberty, and the right of private property. Personal security included preservation of life, limb, health, and reputation. Personal liberty Blackstone defined as the "power of locomotion, of changing situation, of moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." Among the secondary rights which Blackstone mentions are the right of petition, the right to bear arms, and the right to seek justice in the courts of law. These, he stated, are derived from the primary rights. He makes no mention in this connection of religious liberty or any general freedom of speech and of the press. Certain other privileges or immunities of the subject, however, such as those relating to the quartering of soldiers in subjects' houses in time of peace, unreasonable searches and seizures, and cruel and unusual punishments, which Blackstone excludes from the category of "absolute rights" or "liberties," he disposes of under the description of "relative rights." It is unnecessary to multiply instances of the use of the word, liberty, by the English lawyers. The American people were familiar from earliest times with this juristic sense of the term, as witness the Massachusetts Body of Liberties of 1641, the most notable of the ancient codes in the Colonies.[1] The Federal Constitution,

Primary and secondary liberties

[1] The best evidence of the meaning attached to the word, liberty, as used in colonial legal documents, is afforded by section 91 of the Massachusetts Body of Liberties, dealing with the "liberties of foreigners and strangers": "There shall never be any bond slavery, villeinage, or

however, when referring in a general manner to the juristic liberties of the American citizen, employs the expression "privileges and immunities." [1]

(2) Specific meaning: liberty of the person

Among these ancient "liberties" there was one which stood out so conspicuously that it may fairly be called the "liberty" without further description. That was personal liberty. Blackstone, having defined it as quoted above, added that personal liberty was perhaps the most important of all the civil rights. Liberty of the person, like the other fundamental liberties, goes back to *Magna Carta*. The famous thirty-ninth article of the Great Charter provided that "no freeman shall be taken or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him,[2] unless by the lawful judgment of his peers, or by the law of the land." In 1215 the expression "personal liberty" was not in use, but the idea was clearly expressed in the first clause of this article. "No freeman shall be taken or imprisoned": what words could express more clearly the idea—or perhaps it might better be said, in view of the actual condition of the people in England at that time, the ideal—of that particular liberty which, as Coke sagely commented, the framers of the

captivity amongst us, unless it be lawful captives taken in just wars, and such strangers as willingly sell themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of God established in Israel concerning such persons doth morally require. This exempts none from servitude who shall be judged thereto by authority." Lawful captives and other persons who had been sold into slavery were to enjoy certain "liberties," though deprived of the most important liberty of all, liberty of the person. Compare also this from an Act of the Maryland Assembly in 1639: "Holy Church, within this province, shall have all her rights and liberties; that the inhabitants shall have all their rights and liberties according to the great charter of England," etc.

[1] See Article IV, section 2, paragraph 1, and Amendments, Article XIV, section 1.

[2] That is, send others to pass upon, or condemn, him. Cf. Coke's *Second Institute*, 54.

Charter put first in the article because they valued it most highly?[1]

Constitutional protection of personal liberty

This was the liberty, the infringement of which was the chief ground of complaint in the Petition of Right, the great platform of the Parliamentary party in the struggle against arbitrary royal rule in the seventeenth century. To secure this liberty against usurpation was the sole purpose of the *Habeas Corpus* Act of 1679, the Englishman's front-line trench against the assaults of despotism. To strengthen that security was the principal purpose of the Bill of Rights, the most precious fruit of the "glorious revolution" of 1688. It was this particular liberty which Blackstone had in mind when he wrote that "the Great Charter protected every individual of the nation in the free enjoyment of his life, liberty, and property unless declared to be forfeited by the judgment of his peers or the law of the land." It was this liberty also which the American "Founding Fathers" had in mind when they provided that no person should be deprived of life, liberty, or property without due process of law. The evidence is so clear that the liberty of the due-process clauses of the Constitutions, Federal and State, is no other than personal liberty, that it would seem unnecessary to discuss the question but for the adoption in recent years of a different opinion by the Supreme Court. Perhaps the best witness on this point is the eminent Chancellor Kent, the first edition of whose *Commentaries* was published in 1826. "The right of personal liberty is another absolute right of individuals, which has long been a favorite object of the English law. It is not only a constitutional principle . . . that no person shall be deprived of his liberty without due process of law, but effectual pro-

[1] See C. E. Shattuck, "The True Meaning of the Term 'Liberty' in those clauses in the Federal and State Constitutions, which protect 'Life, Liberty, and Property.'" *4 Harvard Law Review,* 365-392.

vision is made against the continuance of all unlawful restraint or imprisonment, by the security of the privilege of *habeas corpus*."[1]

Summary of meanings of liberty

The term, liberty, was accordingly used in three well-defined senses by the generation of Americans who fought the Revolution and formed the Union. In the first place, it meant what may be further described as political liberty. There were two definitions of political liberty which would have been generally understood. One was the "natural-rights" or "social-compact" definition, which Blackstone had put into terms familiar at least to the lawyers of the period.[2] This is the definition which best suits the language and the spirit of the earlier part of the period, that of the Declaration of Independence. The other definition of political liberty in general currency at that time was that which associated it with the reign of just laws.[3] This is the definition which best suits the later and more constructive part of the period. It describes the liberty of the Preamble to the Constitution. Secondly, liberty meant the general body of traditional privileges and immunities which had been transformed by the Revolution and the State and Federal Constitutions into rights of American citizens. These "liberties" collectively, Blackstone designated, when necessary to avoid ambiguity, by the general expression, public liberty. Thirdly, there was one of these "liberties" in particular, which Blackstone distinguished from the others, when necessary, by the specific expression, personal liberty. This liberty was so much more important than any other that it was generally known as liberty without further qualification, and along with life and property was specially guaranteed against deprivation

[1] James Kent, *Commentaries on American Law*, 12th edition, vol. II, p. 26.

[2] See *supra* p. 275.

[3] See *supra* p. 289. This is the definition which may now be called the political-scientific.

without due process of law. This was the liberty of the Fifth Amendment to the Federal Constitution.

2

Personal liberty and other juristic liberties in the American constitutions

There is no evidence in the debates in the Congress of the United States, at the time when the Fifth Amendment was submitted to the States for ratification, that there was any confusion between these various senses of the term, or that anyone understood the liberty of the Fifth Amendment in any other than its specific juristic sense. It meant personal liberty, as currently understood by the English and American lawyers. In other words, it meant the absence of physical restraints upon the individual's person or body. Other "liberties," which the "Founding Fathers" wished particularly to preserve, are clearly expressed in the constitutional documents of the period. Religious liberty, for example, as well as freedom of speech and of the press, freedom of assembly and of petition, and liberty to bear arms, are specified in the first ten amendments to the Federal Constitution and in several of the original State constitutions. If the liberty of the Fifth Amendment had been understood to mean more than liberty of the person, either the specification of some at least of these other "liberties" would have been superfluous or the omission of any not specified would have been dangerous. It would not be necessary to insist so emphatically upon the contemporary understanding of the liberty of the Fifth Amendment, if later generations of Americans had not advanced radically different interpretations of the term, which have profoundly affected the adjustment of the conflicting interests of the various classes of society in modern times, particularly those of capital and labor. But the modern struggle between capital and labor did not become acute until the meaning of liberty, as used in the Constitution, had already been unsettled.

The liberty of the Freedmen under the Thirteenth Amendment

It was the struggle for the abolition of slavery which furnished the first occasion for a reconsideration of the meaning of liberty in the United States. In 1865 slavery and involuntary servitude except as a punishment for crime was abolished by the Thirteenth Amendment to the Federal Constitution. The Amendment did not specifically provide that the Freedmen should have any particular kind of liberty, but the enjoyment of liberty of some sort was the necessary consequence of the abolition of slavery. The question promptly arose, What should the nature of their liberty be? It was generally agreed that they should have at least the same personal liberty as the white people of the United States. But there was strong opposition, especially in the South, to the immediate grant of all those privileges and immunities which made up the public liberty of the white people. It was contended that the black race was not then fit for complete equality before the law. In the former slave States much legislation was enacted designed to put the negroes under some form of tutelage whereby they would occupy a status intermediate between that of free white men and that of chattel-slaves. These laws imposed various restrictions upon their right to live and do as they pleased, which were not imposed upon white men. They were in some States forbidden to appear in the towns in any other character than as menial servants. They were required to reside on and cultivate the soil without the right to purchase and own it. They were excluded from many gainful occupations, and were not permitted to give testimony in the courts in any case where a white man was a party. They were forbidden to make certain contracts, particularly contracts for marriages between the races. To be sure, this last restriction existed, not only in many of the former slave States, but also by long-standing enactments in some where slavery had never existed. But now the efforts of Southern legis-

latures to impose new bonds upon the Freedmen cast doubts upon their good faith in accepting the emancipation. In 1866, therefore, the Congress of the United States, distrusting the purposes of the existing local governments in the South, sought to make the freedom of the Freedmen more secure by putting their new-found liberty under the special protection of Federal laws.

First Federal civil rights act

The first Civil Rights Act was designed to give the negroes the same civil rights as were enjoyed by free white people. It was justified as a measure for the enforcement of the Thirteenth Amendment. It provided that there should be no discrimination with respect to civil rights among the inhabitants of any State on account of race, color, or previous condition of servitude, and that all should have the same right to go and come at pleasure, to engage in any lawful calling, to acquire and dispose of property, to make contracts, including marriage contracts with members of other races, and to sue in the courts, and in general should enjoy on equal terms the rights of free citizens. Such an act could be justified only on the theory that the liberty, which it was the object of the Thirteenth Amendment to secure, was more than the mere liberty of the person. The Radical Republicans, who supported the measure in Congress, must have understood the liberty of the Thirteenth Amendment to comprehend nothing less than the whole of the public liberty of Americans under the Federal and State Constitutions. Some of them indeed went further and identified it with the political liberty of the Preamble rather than with the public liberty of the body of the Constitution.[1] Be that as it may, the President

[1] Senator Trumbull, for example, the author of the Act, speaking on the question in the Senate, (*The Congressional Globe,* 39th Congress, 1st Session, p. 474), January 29, 1866, said: "Has Congress authority to pass such a bill? Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. . . . It is difficult, perhaps, to define accurately what

of the United States took a different view and vetoed the Act on the ground that it was unconstitutional. Evidently he supposed that the abolition of slavery merely put an end to all restraints upon personal liberty, except those imposed by due process of law as a punishment for crime. He was unwilling to sanction interferences by the Federal Government with efforts by any of the States to create for negroes a legal status inferior to that enjoyed by whites, provided that the negroes were not deprived of their liberty of the person. Thus the question became urgent, whether as a matter of fact the liberty of the Thirteenth Amendment was political liberty or public liberty or personal liberty.

The Fourteenth Amendment

The Radical Republicans passed the first Civil Rights Act over President Johnson's veto, and then, in order to make their policy as nearly irrevocable as possible and remove all doubts concerning the constitutionality of such legislation, the Fourteenth Amendment was submitted to the States and two years later (1868) ratified by the necessary three-fourths majority. The Amendment begins by "recalling" the Dred Scott decision. This was done by a provision that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

slavery is and what liberty is. . . ." Then, quoting Blackstone's definition of political liberty, he proceeded: "That is the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the amendment which has recently been adopted; and in a note to Blackstone's Commentaries it is stated that—'In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.' Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which by the Constitution is prohibited." Thus he justified the Civil Rights Act as an act to declare the meaning of the Thirteenth Amendment and to regulate the process by which Freedmen might vindicate their rights in the courts of justice.

reside. That made the negroes incontestably part of the American people. It next provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. That assured to the negroes the public liberty of Americans. Their public liberty in the capacity of citizens of particular States was secured to them, now that their citizenship was assured in the States wherein they might reside as well as in the United States, by that provision of the original Constitution, guaranteeing to the citizens of each State all the privileges and immunities of citizens in the several States. These absolute guarantees of the privileges and immunities of citizens were strengthened and confirmed by the further provision that no State should deny to any person within its jurisdiction, whether a citizen or not, the equal protection of the laws.[1]

The due-process clause

Finally, in addition to these absolute guarantees, the Fourteenth Amendment provides the conditional guarantee that no State shall deprive any person of life, liberty, or property without due process of law. A person may

[1] The distinction between State and Federal citizenship was preserved, despite the arguments of those who would have liked to merge State citizenship into that of the Union, because of the differences that had existed and might continue to be found desirable between the public liberty of citizens of different States. Originally, for instance, some States had laws establishing state churches or favoring particular sects above others. While complete religious liberty had become the policy of all the States a generation before the final emancipation of the slaves, there was nothing in the Federal Constitution to prevent a State from abridging the freedom of religion, as several of them had formerly done, or altering the institution of marriage, as the Mormons were then doing in their desert-refuge, or revolutionizing the system of private property in order to experiment with some form of communism, as many Americans of the generation before the Civil War wished to do. There was no purpose on the part of the Congress, which framed the Fourteenth Amendment, to make public liberty mean the same thing in all the States of the Union. Room was to be left, after the adoption of the Fourteenth Amendment as before, for a diversity of institutions and of rights in the several States, provided that the States did not disturb the equality of negroes and whites before the law.

be deprived of this liberty, although, if a citizen, he is entitled to all the privileges and immunities of American citizens and, even if not a citizen, may not be denied the equal protection of the laws; but he may be deprived of this liberty only with due process of law. It would seem clear that this particular liberty, of which he may under certain circumstances be deprived, cannot be the public liberty of an American citizen, because the privileges and immunities composing his public liberty cannot be constitutionally taken from him by the ordinary process of law, but only by a constitutional amendment. It cannot be complete political liberty, because that is a philosophical, not a juristic, concept, and cannot be justly diminished by any process of law. It is evident that the authors of the Amendment intended that negroes, like whites, should enjoy the blessings of that liberty which is specified in the Preamble to the Constitution as the last of the great objects of constitutional government in the United States. But this liberty is the concern of the entire first section of the Amendment, not of any particular clause alone, certainly not of any single phrase or word. In the light of all the circumstances which illuminate the Fourteenth Amendment, can it be said that the specific liberty of which a person may not be deprived by any State without due process of law is any other than the personal liberty which was protected against undue restraint through the action of the Federal Government by the Fifth Amendment adopted seventy-seven years before? The answer could hardly fail to be in the negative, but for the fact that the Supreme Court of the United States has itself given another answer to the question. This answer, however, was not given without long hesitation and did not become the foundation for judicial decisions, affecting the adjustment of the conflicting interests of different classes of people, until after the close of the nineteenth century.

Within the present century, unfortunately, disputes over the meaning of liberty have produced livelier controversy than any other juristic problems arising under the Constitution.

3

The Slaughter-house Cases

The first occasion for judicial consideration of the liberty of the Fourteenth Amendment was furnished by the notorious Slaughterhouse Cases, decided by the Federal Supreme Court in 1873.[1] In 1869 the "carpet-bag" legislature of Louisiana granted to a corporation, specially created for the purpose, the exclusive privilege for twenty-five years of maintaining slaughterhouses in New Orleans. Such a grant seemed an intolerable discrimination to the local butchers, whom it would put out of business unless they did their slaughtering on the premises of the favored corporation, paying the charges demanded for a share in the privilege; and the impending monopoly became odious to the people of the locality. The grant was accordingly attacked in the courts on several grounds, among others, that it conflicted with the Fourteenth Amendment. It was contended on behalf of the butchers of New Orleans that the grant abridged their privileges and immunities as citizens of the United States, and also that it deprived them of property without due process of law. Little was said about their constitutional liberty, except what was implied in the claim of the privileges and immunities of citizenship. The case, therefore, raised squarely the question where the line should be drawn between those rights of citizens which belong to them by virtue of their State citizenship and those which they are entitled to enjoy as citizens of the United States. It raised also the question whether a butcher's business is property of which he may not be constitutionally deprived

[1] 16 Wallace, 36.

by such a process as that pursued in this case by the government of Louisiana. Finally, it raised, but not very clearly, the question whether a butcher's right to choose his business is a part of that liberty, of which he may not be deprived without due process of law.

Personal liberty and the police power

The Supreme Court of Louisiana sustained the grant as a valid exercise of the police power of the State. It held that the legislature had authority to impose restraints upon the slaughtering of animals for food in the vicinity of a large city for the purpose of protecting the public health, and that the legislature was entitled to use its own discretion in determining what restraints were appropriate in any particular case. The fact that the New Orleans butchers would be put out of business, unless they did their slaughtering on the premises set apart for such use and paid the prescribed charge, did not necessarily make the measure which the legislature had adopted unsuitable for its purpose. Upon appeal to the Supreme Court of the United States this judgment was affirmed by a bare majority of the Court. Justice Miller, who wrote the opinion for the majority, did not discuss the question whether a butcher's right to choose his business is a part of that liberty of which he may not be deprived without due process of law. Evidently he did not take seriously the suggestion that the liberty of the due-process clause was any other than the liberty of the person. He dismissed the entire due-process clause with the observation that it had been in the Constitution as a restraint upon the power of the Federal Government since the adoption of the Fifth Amendment and was also to be found in most of the State constitutions as a restraint upon the power of the State governments, and that consequently they were not without judicial interpretation of its meaning. "And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem

admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held a deprivation of property within the meaning of that provision."

The privileges and immunities of American citizenship

The majority of the court gave its most serious attention to the complaint that the restriction of the freedom to butcher animals where one pleased was an abridgment of the privileges and immunities of American citizenship. Indeed, as Justice Miller pointed out, the other arguments were not much pressed in the trial of the case before the Supreme Court. He called attention to the fact that the distinction between citizenship of the United States and citizenship of a State was clearly recognized and established. He then considered the question, what privileges and immunities pertain to State and what to Federal citizenship, and indicated that only the latter fall under the protection of the Fourteenth Amendment. The former, however, had before the Civil War included all those privileges and immunities "which belong of right to the citizens of all free governments"; and had accordingly embraced "nearly every civil right for the establishment and protection of which organized government is instituted." That did not leave much to be covered by the privileges and immunities of Federal citizenship, unless by the adoption of the Fourteenth Amendment a substantial portion of the privileges and immunities of citizens of the States had been transferred into the domain of Federal citizenship. "Was it the purpose of the Fourteenth Amendment," Justice Miller inquired, "by the simple declaration that no State should make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, to transfer the security and protection of all the civil rights . . . from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article,

was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"[1]

Justice Miller's opinion of the meaning of the Fourteenth Amendment

Justice Miller was one of the ablest members of the Supreme Court during the generation following the Civil War, and his answer to his own question is of more than ordinary significance. "All this and more must follow," he said, "if the proposition of the plaintiffs . . . be sound. . . . Such a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious . . . when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." So the majority of the Court reached the decision that the grant of an odious monopoly, as complained of in the Slaughter-house Cases, was not a wrong for which there was any remedy in the Federal courts under the Federal Constitution. The Fourteenth Amendment would protect the personal liberty of all kinds of persons, but it left public liberty for the most part to the protection of the States, where it was before. It would protect negroes against

[1] Case cited, p. 77.

unjust discrimination with respect to their liberties under the laws of the States, but not butchers against the enforcement of State health regulations, even if these were of doubtful wisdom. The blessings of political liberty were to be secured to all Americans, black as well as white, but mainly, as before, through the instrumentality of the State governments. The plaintiffs were accordingly dismissed to right their wrong, if any, through the instrumentality of the government of Louisiana.[1]

Justice Field's opinion

But the dissenting judges could not dismiss the plaintiffs so lightly. Justice Field, the one judge who perhaps could challenge Justice Miller's claim to supremacy among the able members of the Supreme Court in the latter part of the nineteenth century, asked himself the same question, which Justice Miller had raised. "What, then, are the privileges and immunities which are secured against abridgment by State legislation?" "The privileges and immunities designated," he replied, "are those which of right belong to the citizens of all free governments."[2] Thus he, in effect, denied the distinction between State and Federal citizenship, and sought to transform the inquiry concerning the nature of the liberty of the Fourteenth Amendment from one relating to the law of the Constitution of the United States into one relating to the philosophy of republican government. This opened a wide realm for speculation, a realm in which Justice Field, with his fine philosophical intellect, was more at home than even the soundest legalistic jurists like his colleague Justice Miller. Clearly among these privileges and immunities,

[1] It may be noted in this connection that the injured butchers succeeded in obtaining the redress of their grievance by the State legislature. A remedial act, destroying the monopoly, was passed and was eventually sustained by the Federal Supreme Court, like the first enactment, as a valid exercise of the police power. Butchers' Union Co. *vs.* Crescent City Live Stock Landing and Slaughtering Co., 111 U. S., 746 (1883).

[2] Case cited, p. 97.

he continued, "must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally effects all persons. . . . All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness. . . ." He quoted with approval the dictum of a lower court that "there is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." In other words, Justice Field asserted among the privileges and immunities of American citizenship a right to liberty, not the juristic liberty of the text of the Constitution, but the philosophical liberty of the Preamble. To liberty, so conceived, he gave, however, not the political-scientific meaning attached to it by the "Founding Fathers," but a different meaning which it is not difficult to recognize as akin to that ascribed to the term by the English Utilitarians. Thus began the effort to read utilitarianism into the Constitution of the United States.

Justice Bradley's opinion

The next step in the process of reading utilitarianism into the Federal Constitution was to transfer the new idea of liberty from the category of privileges and immunities, "which of right belong to the citizens of all free governments," to that of special American rights, included under the guarantee of life, liberty, and property, of which no person may be deprived without due process of law. It would not do to leave the security for the citizen's liberty "to acquire property and pursue happiness" to the uncertain results of philosophical speculation by Supreme Court judges concerning the rights of citizens "of all free governments." Supreme Court judges have no better standing than other citizens in the province of philosophy. Their special province is jurisprudence, the jurisprudence not of all free governments, but of the United States alone. The

foundation of their authority to construe the Constitution is their functional responsibility for the observance of due process of law. This was perceived by at least two of Justice Field's dissenting colleagues, when the case of the New Orleans butchers was under consideration. Justice Bradley, who concurred in Justice Field's opinion, added a separate opinion of his own. The Fourteenth Amendment, he reiterated, not only prohibited the States from making or enforcing any law which will abridge the privileges or immunities of citizens of the United States, but also prohibited them from depriving any person (citizen or otherwise) of life, liberty, or property without due process of law. "In my view," he declared, "a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty, as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property."[1] Thus the idea of liberty adopted by Justice Bradley was associated in his mind, not merely with the rights of free citizens everywhere upon general principles, but especially with the rights of Americans under the due-process clause. Justice Bradley can hardly be described as a Utilitarian. The source of his idea of liberty, as of Justice Field's, was not contemporary English political philosophy, but the political philosophy of the eighteenth century. The practical effect of their opinions, however, was to prepare the way for the eventual triumph of utilitarianism.

Justice Swayne's opinion

The difficulty involved in any philosophical interpretation of the term "liberty," as used in the Fourteenth Amendment, is revealed by the opinion of another of the dissenting judges in the Slaughterhouse Cases. Justice Swayne expressly concurred with Justice Field in all that

[1] Case cited, p. 122.

he said with reference to the general spirit of free government. He also concurred with Justice Bradley concerning the incompatibility of the special privileges granted by the Louisiana legislature with the liberty of which no person may be deprived under the Fourteenth Amendment without due process of law. Then he proceeded to define that liberty as "freedom from all restraints but such as are justly imposed by law."[1] This, of course, is a correct statement of the political-scientific idea of liberty, and correctly reflects the traditional understanding of the term as used in the Preamble to the Constitution. In applying it to the Fourteenth Amendment, Justice Swayne was in effect repudiating the specific juristic concept of liberty as absence of physical restraint of the person or body, which the "Fathers" had learned from Blackstone. But the substitution of a philosophical for the juristic idea of liberty made it dependent for its practical significance upon the idea of justice that might be associated with it. Upon his own statement liberty, under the Fourteenth Amendment, does not include freedom from restraints imposed by just laws. When Justice Swayne declared, therefore, that in his opinion the act, granting a virtual monopoly of the slaughtering business at New Orleans to a privileged corporation, was unconstitutional, he was saying in other words no more than that he thought the act unjust. Under the guise of preserving the due process of law, he was setting up his own opinion of the justice of a measure against that of the legislature which enacted it into law.

Judicial censorship of State legislation under the Fourteenth Amendment

In 1873, however, the majority of the Supreme Court were plainly of the opinion that the judicial duty to maintain the due process of law could not authorize judges to pass upon the theoretical justice of such measures as that under consideration in the Slaughterhouse Cases. Indeed, none of the judges expressed agreement with Justice

[1] Case cited, p. 127.

Swayne that the Court must first determine whether a law be just or unjust in order to decide whether or not proceedings under its authority are in accordance with that due process which is guaranteed by the Fourteenth Amendment. If the liberty of the due-process clause were not merely personal liberty, but also the entire political liberty of the Preamble to the Constitution, there could be no constitutional legislation under the police power of the States, unless and until the Federal Supreme Court were convinced of its justice, because all such legislation necessarily imposes some restraint upon the personal conduct of those who may be affected by its enforcement. If the liberty of the due-process clause meant anything more than the liberty of the person in the juristic sense of the term—certainly if it meant a right to do as one pleased, as some of the dissenting judges seemed to think, to pursue happiness, each according to his own view of his interest, unrestrained except by just laws—the consequences, so far as the duty of the Supreme Court is concerned, would be substantially the same. The position of Justice Bradley was practically the same as that of Justice Swayne, except that the former committed himself to a certain known theory of justice, whereas the latter did not.

Upon Justice Bradley's principles, the liberty of each to pursue happiness in his own way could not be restrained by laws designed to protect the life, limb, health, or reputation of others, unless the restraint seemed to the Court to be reasonable. What was reasonable he seemed disposed to determine upon utilitarian principles; but precisely what test of reasonableness he would apply, whether Mill's, Spencer's, or some other, he did not say. Justice Field's position differed from this practically in only one respect: he would have reserved the benefits of judicial review in such cases to citizens. All three dissenting judges held a view of the meaning of the liberty of the

Fourteenth Amendment, which would have required the Supreme Court to determine the necessity and propriety of all legislation under the police power of the States, the justice of which might be challenged in the courts of law. Such a tremendous responsibility was appalling to the majority of the Court. They no doubt gladly declined to become, as Justice Miller put it, a "perpetual censor" of State legislation.

Traditional view of the function of the courts with respect to the protection of personal liberty

There was nothing in the opinion of the majority of the Court, however, to prevent the State courts from examining the general principles of free government, in order to inspire the public liberty of the States with their favorite views of liberty and justice. The nature of the privileges and immunities of State citizenship remained as before for determination, in cases of doubt, by the proper authorities of the States. In this particular case the State courts had refused to consider, whether grants of monopoly should be held odious on the grounds which had induced the Parliament of England in the time of James I to make the great statute against monopolies, or on the grounds which convinced John Stuart Mill in their own time of the expediency of a general policy of free competition and *laissez faire*. They were of the opinion that these were matters for consideration by the political branches of the State government, not by the judiciary. In Louisiana it was settled that the public liberty of the citizens of the State was not the philosophical liberty for which Mill had recently made such a strong appeal in his great essay, but the general body of juristic liberties, as understood by the "Founding Fathers." Nor were the State courts, any more than the Federal Supreme Court, concerned with the wisdom or expediency of legislative enactments under the police power. Their duty in connection with such legislation was performed, when they had seen to it that no one was deprived of

his life, liberty of the person or property, without due process of law.

Expansion of the police power in the latter part of the nineteenth century

The Federal Supreme Court, though not all the State courts, continued to act upon this opinion down to the end of the nineteenth century. During that period several noteworthy pieces of legislation, which Mill and the Utilitarians could never have supported, were enacted under the police power of the States, and were sustained both by the State courts and by the Supreme Court of the United States. They sustained a law regulating the rates charged by railroads and grain elevators, although the existence of monopoly was by no means clear.[1] They sustained a law prohibiting lotteries, although the lottery that would be destroyed thereby was conducted under a charter granted by the legislature expressly for the purpose and in return for a valuable consideration.[2] They sustained a law prohibiting the manufacture and sale of intoxicating liquors, although the prohibition extended to the manufacture of such beverages in the household for purely personal use.[3] They sustained a law prohibiting the manufacture and sale of oleomargarine, although the prohibition extended to oleomargarine manufactured from wholesome materials not offered for sale fraudulently in imitation of butter.[4] They sustained a law regulating the hours of labor of coal miners, although the miners were grown men of sound mind and independent character.[5] They sustained a law compelling all persons to submit to vaccination against the smallpox, although some of them were strongly opposed to vaccination on religious or scientific grounds and were willing to assume all the risks from the spread of the disease.[6] Each of these measures

[1] Munn *vs.* Illinois, 94 U. S., 113 (1876).
[2] Stone *vs.* Mississippi, 101 U. S., 814 (1879).
[3] Mugler *vs.* Kansas, 123 U. S., 623 (1887).
[4] Powell *vs.* Pennsylvania, 127 U. S., 678 (1888).
[5] Holden *vs.* Hardy, 169 U. S., 366 (1898).
[6] Jacobson *vs.* Massachusetts, 197 U. S., 11 (1905).

imposed comparatively severe restraints upon the liberty of some individuals to pursue happiness or otherwise do as they pleased. Each was challenged in the courts as an unjust discrimination against a particular class of persons, generally businessmen of some sort, in favor of another class, sometimes farmers, sometimes wage earners, sometimes no recognized class-conscious group. Evidently the courts saw in these cases no abridgment of the public liberty of citizens, either of the States or of the United States, and no deprivation of personal liberty without due process of law.

Judicial opposition to the unrestricted exercise of the police power

In several of these cases, however, there were strong dissents from the judgment of the court by a minority of the judges. In the Granger Cases, which came before the Supreme Court three years after the Slaughterhouse Cases were disposed of, Justice Field contended that legislation regulating railroad and grain elevator rates deprived the carriers and warehousemen of a portion of their liberty under the due-process clause of the Fourteenth Amendment, since it prohibited them from charging what they pleased for their services. "By the term 'liberty' as used in the provision," he wrote, "something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of happiness. . . ."[1] He repeated almost the identical words twelve years later in the Oleomargarine Case. "By 'liberty' as thus used, is meant something more than freedom from physical restraint or imprisonment. It means freedom not merely to go wherever one may choose, but to do such acts as he may judge best for his interest not inconsistent with the equal rights

[1] Munn *vs.* Illinois, at p. 142.

of others. . . ."[1] In this case he was convinced that the liberty of the due-process clause included a right to manufacture oleomargarine in imitation of butter and sell it as a substitute for butter, in spite of the risk of fraud on the part of dishonest dealers who might easily misrepresent it to be butter. The consumer had his right to protect himself against fraud by due vigilance when buying, and the farmer, whose butter cost more to produce than oleomargarine and hence was also interested in the prevention of fraud, had the right to protect himself by clearly labeling the genuine butter. But the State legislature, he argued, had no right to destroy the oleomargarine business merely to prevent the fraudulent sale of oleomargarine for butter. That, he declared, was a deprivation of liberty to manufacture and sell a wholesome substance without due process of law. Thus Justice Field adopted the view of the liberty of the due-process clause, which Justice Bradley had advanced in the Slaughterhouse Cases, but Justice Bradley did not agree with him in the Granger Cases, and no member of the Federal Supreme Court agreed with him in the Oleomargarine Case.

Utilitarianism and the Fourteenth Amendment

Justice Field wisely gave up the attempt to derive one's right to do as one pleases from the privileges and immunities "which of right belong to the citizens of all free governments," and undertook the less philosophical but much more judicial task of deriving it from the liberty guaranteed by the due-process clauses of the Federal Constitution. In the Granger Cases, indeed, it was plainly evident that the right to charge what the traffic would bear was not one of the privileges or immunities which Englishmen had been wont to enjoy, when engaged in businesses "affected with a public interest." Moreover, those who were most interested in resisting the enforcement of the Granger laws were not individual businessmen but corpora-

[1] Powell *vs.* Pennsylvania, at p. 691.

tions. By a legal fiction corporations might be judicially regarded as persons and hence entitled not to be deprived of liberty without due process of law. But no fiction could make them citizens, entitled to all the privileges and immunities of citizens of the several States and of the United States. Utilitarianism is concerned primarily with the liberty of natural persons, not of corporations, but one of the most cherished attributes of personality, especially in the later "rational" utilitarianism of Herbert Spencer, is freedom of contract, including freedom to form voluntary associations and to co-operate through the instrumentality of limited liability companies or corporations, as they are commonly called in the United States. It would have been of little advantage to American businessmen to have had utilitarianism read into the Constitution, unless the "liberty" of corporations, so far as their charters would permit, was to be protected as well as that of natural persons. As the charter of a corporation was itself construed to be a contract between the incorporators and the State by which the charter was granted, and the privileges which it conferred were deemed to be obligations which the States were forbidden by the Federal Constitution to impair, the reading of utilitarianism into the Constitution promised to give "vested" business "interests" unprecedented security against political attacks by competitive business interests and hostile interests of every kind.

Reconstruction of the due-process clause

But the endeavor to give the liberty of the due-process clause a utilitarian cast was fitful rather than consistent. No American effort to make men better by legislation was more vigorously condemned by John Stuart Mill than that which he referred to as the Maine idea. Justice Field, however, saw nothing incompatible with the liberty of Americans in the prohibition of the manufacture and sale of intoxicating liquors. In a test case which was decided

in the same year as the Slaughterhouse Cases, he expressly declared such a prohibition to be a proper exercise of the police power.[1] He added that the provision, that no person should be deprived of liberty without due process of law, was not intended to impose any new limitation upon the exercise of the police power by the States. Nor did he ever succeed in persuading a majority of his colleagues to declare a statute unconstitutional on the ground that it deprived a person of liberty "to do such acts as he may judge best for his interest, not inconsistent with the equal rights of others." After his resignation from the Supreme Court the Utah coal mines eight-hour law, and the Massachusetts compulsory vaccination law, neither of which could have been supported by a throughgoing Utilitarian, and both of which Justice Field would probably have opposed, were sustained, only a small minority of the judges dissenting. The fact was that utilitarianism was an unfamiliar doctrine to most judges at that time; and opposition to these measures on such grounds as Justice Field suggested would appear as an attempt to apply the doctrine of natural rights. But the Federal Supreme Court was not so innocent as to try to enforce natural rights by judicial processes.

Utilitarianism in the State courts

In the State courts, however, there were several cases during the last ten or fifteen years of the nineteenth century in which a utilitarian concept of liberty was adopted by a majority of the judges. Of these cases, several decided in New York were the most conspicuous. In that State a law prohibiting the manufacture of cigars in tenements was declared unconstitutional in 1885;[2] a law prohibiting the sale of oleomargarine, in 1885;[3] a law regulating the charges of grain elevators, in 1889;[4] a law

[1] Bartemeyer *vs.* Iowa, 18 Wall. 129 (1873).
[2] *In re* Jacobs, 98 N. Y. 98 (1885).
[3] People *vs.* Marx, 99 N. Y. 337 (1885).
[4] Budd *vs.* New York, 117 N. Y. 1 (1889); but cf., 143 U. S. 517 (1892).

prohibiting the employment of women in industry at night, in 1907;[1] and a law prohibiting the sale of intoxicating liquors had been declared unconstitutional as early as 1856.[2] In most of the States, however, in which a utilitarian concept of liberty was adopted, it was chiefly measures for the protection of industrial wage earners that were declared unconstitutional. These measures were condemned on the ground that they deprived both employers and employes of a portion of their liberty to make contracts relating to the employment.

Triumph of Utilitarianism

The gradual development of the idea, that freedom of contract is comprehended in the liberty which is guaranteed by the due-process clauses of the Fifth and Fourteenth Amendments, is illustrated by the following cases. First, Justice Bradley in his concurring opinion in Butchers' Union Co. *vs.* Crescent City Co.[3] reiterated the view which he had originally advanced in the Slaughter-house Cases, putting it more clearly than before. "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. . . . I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. . . . But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him

[1] People *vs.* Williams, 189 N. Y. 131 (1907).
[2] Wynehamer *vs.* The People, 13 N. Y. 378 (1856).
[3] 111 U. S. 746 (1883).

(to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen." Thus Justice Bradley identified the liberty of the Fourteenth Amendment with the liberty of the Declaration of Independence. Five years later in the Oleomargarine Case[1] Justice Harlan, speaking for the Court, gave this view for the first time the sanction of a majority of the Court. "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights to liberty and property, as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principle of public law." In that case, however, it was held that the legislation under consideration did not deprive any person of such liberty or property without due process of law. Finally, in Allgeyer *vs.* Louisiana [2] Justice Peckham, who seems to have been a genuine Utilitarian, and not a follower of the natural rights school of jurisprudence, like Justices Bradley and Harlan, declared on behalf of the Court that "in the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto." In this case, however, the contract, which was prohibited by the State, had been made outside the jurisdiction of the State, and on that ground the act of prohibition was declared unconstitutional.

The first case in which an act prohibiting contracts within the jurisdiction of the State was declared unconsti-

[1] Powell *vs.* Pennsylvania, 127 U. S. 678, at p. 684.
[2] 165 U. S. 578 (1897).

The New York Bakers' Case

tutional by the Federal Supreme Court on the ground that it deprived a person of his liberty of contract without due process of law was that of the New York bakers' ten-hour law, decided in 1905.[1] In this case Justice Peckham, who had vainly tried to induce the Court to veto the Utah coal mines eight-hour law and the Massachusetts compulsory vaccination law on similar grounds, finally won a majority over to his view, and wrote the opinion by which utilitarianism was definitely read into the Constitution of the United States. This law had been sustained by the State courts as a proper police regulation, though the judges were closely divided in opinion. A bare majority of the Federal Court, however, were of the opinion that "a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is . . . so wholly beside the matter of a proper, reasonable, and fair provision for protecting the health of bakers as to run counter to that liberty of person and of free contract provided for in the Federal Constitution." [2]

In reaching this decision the majority of the Court made the flat statement that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment to the Federal Constitution." The majority recognized, however, that the State has power to prevent the individual from making certain kinds of contracts, and that in regard to such contracts the Federal Constitution offers no protection. "If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment." But, the opinion continued, "it must be conceded that there is a limit to the valid exercise of the police power by the State. . . . In every case that

[1] Lochner *vs.* New York, 198 U. S. 45 (1905).
[2] Case cited, at p. 62.

comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? . . . It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."

Justice Holmes's dissenting opinion

Thus by adding freedom of contract to the personal liberty, which is explicitly protected by the due-process clause, the Supreme Court became that "perpetual censor" upon legislation of the States, relating to the civil rights of their citizens, which Justice Miller and the majority of his associates had viewed a generation earlier with such alarm. The result justified their fears. When it became clear that no police measure could be regarded as finally enacted into law until duly approved by the Supreme Court, the opinions of judges were subjected to the same critical scrutiny as those of other lawmakers. Men saw that, in passing judgment upon the constitutionality of debatable measures, the courts were really pronouncing upon their wisdom and expediency. They were deciding whether the law was just or unjust, not whether it had been enacted or was being administered by due process under the Constitution. It was in vain for judges to declare that they were not "substituting the judgment of the court for that of the legislature." When the majority in the New York Bakers' Case dismissed the question, whether the act was valid as a measure within the police power of the State, by saying,

"There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker," they laid themselves fairly open to the crushing rejoinder which Justice Holmes delivered in a dissenting opinion. "This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. . . . I think the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[1]

Freedom of contract and personal liberty

It does not require much research, as Justice Holmes intimated, to show that "the liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same" is unknown to "the traditions of our people and our law." Sunday laws and usury laws are ancient examples of interferences with "liberty to contract." As late as 1873 such a liberty was unknown to the judges of the Supreme Court. Justice Field made out the strongest case he could against what he termed an "unconscionable monopoly," but he did not claim for the New Orleans butchers a constitutional right to freedom of contract. Even Justice Swayne, whose dissent in the Slaughter-house Cases was most obviously influenced by his opinion of the inherent injustice of the grant of monopoly, did not try to ground his dissent upon utilitarian principles.

[1] Case cited, at pp. 75-76.

Freedom of contract is clearly an addition to personal liberty brought about by the judicial decisions of the late nineteenth century and early twentieth. It appears in its final form in the case of Adair *vs.* the United States, decided in 1908.[1] This case involved the constitutionality of an act of Congress prohibiting railroads engaged in interstate commerce from discharging employees because of membership in labor unions. Here the majority of the Court affirmed "the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation." In this case, of course, this liberty was derived from the Fifth, not the Fourteenth, Amendment. Dissenting, Justice Holmes could only say: "I confess that I think that the right to make contracts at will that has been derived from the word 'liberty' in the Amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or is generally believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued." [2]

But the opinion of the majority prevailed. Thus the Supreme Court read into the Federal Constitution an interpretation of the liberty of the due-process clauses by which the Utilitarians' philosophical idea of liberty was substituted for the specific juristic liberty of the "Founding Fathers." The personal liberty of Blackstone's *Commentaries* was transmuted into the freedom of contract of Spencer's *Principles of Sociology*.

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The construction of the Constitution adopted by the Supreme Court is, of course, the law of the land. But it is

[1] 208 U. S. 161.
[2] Case cited, at p. 191.

Freedom of contract and the police power

historically and philosophically incorrect. As Justice Holmes pointed out, however, in his dissenting opinion in the Adair case, the utilitarian liberty which has been read into the Fifth and Fourteenth Amendments is not altogether without qualification. "The liberty secured by the Constitution of the United States to every person within its jurisdiction," the majority of the Court declared in the Massachusetts compulsory vaccination case, decided in the same year as the New York Bakers' Case, "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."[1] Although Justice Peckham dissented from the judgment of the Court in the compulsory vaccination case, he did not reject their opinion that there are limitations upon the liberty of the Fifth and Fourteenth Amendments. In the opinion which he wrote for the Court in the New York Bakers' Case he correctly indicated the nature of these limitations. "The State," he declared, "has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment."[2] The inquiry into the true meaning of the liberty of the due-process clauses is transformed, therefore, into an inquiry into the nature and extent of the police power.

The nature of the police power

The police power, as Justice Miller had pointed out in the Slaughterhouse Cases, is from its very nature not susceptible of any very exact definition or limitation. He quoted the eminent Chief Justice Shaw of Massachusetts to the effect that it is much easier to perceive and realize

[1] Jacobson *vs.* Massachusetts, 197 U. S. 11.
[2] Lochner *vs.* New York, 198 U. S. 45, at p. 53.

the existence and sources of it than to mark its boundaries or prescribe limits to its exercise. But, he declared, "upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."[1] Then he quotes from the opinion of another eminent State judge: "It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State." A generation later the Supreme Court had made no further progress in its knowledge of the subject. Justice Harlan, who wrote a dissenting opinion in the New York Bakers' Case, in which two of his associates joined, began by saying: "While this Court has not attempted to mark the precise boundaries of what is called the police power of the State, the existence of the power has been uniformly recognized, both by the Federal and State courts. All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizens of his own rights."[2] But Justice Harlan could not go as far as Justice Holmes went, in his dissenting opinion in the same case, already quoted, in fixing the limits to the police power. In general, the courts have left the subject about where Justice Peckham left it in the opinion already cited, merely acknowledging the existence of certain powers, "somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the Court."

Freund, the most authoritative writer upon the police

[1] The Slaughterhouse Cases, 16 Wall. 36, at p. 62.
[2] Lochner *vs.* New York, 198 U. S. 45, at p. 65.

Freund's definition of the police power

power, defines it as "the power of promoting the public welfare by restraining and regulating the use of liberty and property."[1] He divides the public interests which call for regulation and restraint into two classes, the primary social interests, and economic interests of a secondary character. The exercise of the police power for the promotion of the primary social interests includes the protection of the public peace and security, of public safety and health, of public order and comfort, and of public morals. The economic interests of the people may be promoted under the police power by the prevention of fraud and oppression, by the regulation of corporations and trusts and of businesses "affected with a public interest," that is, the so-called public utilities, and by the restriction of the use of property in various ways as through conservation laws, fish and game laws, the regulation of the use of navigable waters, the grant of mill-dam privileges, etc. Under the head of the prevention of fraud and oppression falls the protection of creditors against their debtors and of debtors against their creditors, of laborers against their employers, of businessmen against unfair competition or combinations in restraint of trade, and of consumers against combinations between capital and labor. It is evident that the police power extends to the adjustment of most of the important conflicts of interest between different classes in the community which give vitality to modern politics. It is the principal power which may be invoked, not only in the struggle of classes, but also in the contests between national or religious groups in the modern state. It is the power above all others for the control of which the members of the state contend, in order to use the authority of the state to promote their special interests, whatever the nature of those interests may be.

Nothing more effectively insures domestic tranquillity

[1] Ernst Freund, *The Police Power*, p. 1.

The police power and domestic tranquillity

in a state than the just exercise of the police power. That, in fact, is the key to the nature of the power. It is not the power to promote the public welfare in every possible way, as Freund's definition might seem to suggest. The government of a state may render many substantial services to the people without utilizing the police power. Thus it may promote the general welfare by establishing churches, schools, hospitals, charitable institutions, highways and aids to navigation, post offices and post roads, and many other public utilities. This is the welfare power in the strict sense of the term. By means of the war power, the government may provide for the common defense against external force and violence. The police power is more exactly the power to insure domestic tranquillity. It is the power to accomplish the purpose which is put next after the establishment of justice among the great purposes of the people of the United States which are expressed in the Preamble to the Federal Constitution. It is a power which by its very nature must be invoked primarily in the interest of some particular class of people. It is primarily certain businessmen who are protected against other businessmen by laws against unfair competition. It is primarily certain laborers who are protected against other laborers by laws regulating conditions of employment. By pure food laws some of the people in their capacity of consumers are protected against others in their capacity of producers. But in the long run most businessmen are interested in maintaining definite limitations of some sort upon the methods of competition, and most laborers are interested in maintaining suitable restrictions upon the struggle for employment. And all kinds of persons are interested in the maintenance of the most favorable conditions for productive industry. In any case, the use of the power must be justified in the last analysis by the public interest in the

end which it serves. If the restraint serves the interest of a particular class exclusively, it is an abuse of power, which will disturb rather than insure domestic tranquillity.

Final definition of the police power

It is not enough to define the police power as the power to accomplish one of the great purposes of the people of a modern commonwealth. It is the power to accomplish that purpose by certain means. The appropriate means were indicated by Freund. But it is not altogether satisfactory to say that under the police power domestic tranquillity is insured by restraining and regulating the use of liberty and property. Liberty, standing alone, is too ambiguous a term. By the use of liberty and property Freund meant the exercise of one's right to do as one pleases. This is substantially the same as the natural liberty of the eighteenth-century philosophers and poets and the realistic liberty of the nineteenth-century Utilitarians. It is not the political liberty of the "Founding Fathers." The police power may best be defined as the power of the state to insure domestic tranquillity by imposing restraints upon the conduct of its citizens and of other persons subject to its jurisdiction. If such restraints are never imposed except by just laws, the liberty of the people, as the "Founding Fathers" understood the term, will remain intact. It is when invoked for a purpose which is not truly public that the exercise of the police power abridges the political liberty of the people. The original function of the American judiciary under the due-process clauses of the Federal and State Constitutions was not to consider the wisdom or expediency of restraints imposed upon the conduct of particular individuals or classes under the police power. Under those clauses the courts were not concerned with political liberty in the philosophical sense of the term. Nor were they concerned with the whole body of juristic liberties. They were concerned with certain particular liberties, namely, personal security, personal liberty, and private

property. They were to protect these against deprivation without due process of law. They should, therefore, like other public authorities, satisfy themselves that police regulations are duly enacted in pursuance of public purposes. Beyond that they were not originally intended to go.

Final definition of domestic tranquillity

One of the principal differences between the modern commonwealth and inferior kinds of states is the manner in which the police power is used. Some writers have attempted to distinguish between the superior and inferior kinds of states by the extent to which the individual is left free to do as he pleases. This, however, is a mistake. The purpose of the people of a commonwealth is to insure domestic tranquillity as well as to secure the blessings of liberty. The adjustment of the relations between the individual and the community of which he is a part is not a matter of balancing the individual's liberty to do as he pleases against the authority of the organized community. It is a matter of balancing certain interests, which are more or less peculiar to each individual, against others, which he shares in a greater degree with his fellows, in such a manner as to give due effect to all. In the inferior kinds of states, however, the police power is likely to be abused by those who control the government to promote the special interests of the class to which they belong or even their own private interests. In militarist states it is likely to be abused in the interests of the militarist class; in capitalist states, in the interests of the capitalist class; in proletarian states, in the interest of the proletariat. In the ideal commonwealth it would never be used except to establish that harmonious balance between the different interests of all individuals and classes which is the essence of justice itself. In the modern commonwealth the best evidence that the police power is justly used will be the existence of domestic tranquillity. This does not mean the absence of

contentious issues in the politics of the commonwealth. Politics in the modern commonwealth, as in other bodies politic, is and must ever be a state of contention. Domestic tranquillity means a state of mind on the part of the people of the commonwealth, which is expressed politically in a disposition to abide ungrudgingly by the decisions of the established rulers, when duly enacted into law, until duly altered by the same process.

Ensuring domestic tranquillity a problem of governmental organization and procedure

In the actual government of modern commonwealths there are two difficult problems in connection with the use of the police power. One is to distinguish between public purposes, for which the power may properly be invoked, and private purposes, for which it cannot be used without impairing the character of the commonwealth. The other problem is that of selecting suitable restraints for accomplishing the purpose in view. The latter is usually regarded in the United States as a matter for legislative discretion. This is what the courts mean when they say that they are not concerned with the wisdom or expediency of legislative enactments under the police power. They are responsible, they repeat, only for the constitutionality of such measures. But when they declare that a measure is unconstitutional because in their opinion it deprives somebody of liberty without due process of law, they are really passing upon the nature of the purpose which the measure is designed to accomplish. They are condemning the measure because its purpose seems to them, not public, but private. There is no other way in which the strained interpretation, placed by the courts in recent years upon the liberty of the Fifth and Fourteenth Amendments, can be explained without sacrificing the reputation of the courts for intellectual integrity.

The Federal Minimum Wage Case

Consider, for instance, the decision of the United States Supreme Court, handed down in April, 1923, holding the Federal minimum wage law unconstitutional. This was a

law designed to protect wage-earning women in the District of Columbia against employment at wages insufficient to cover the cost of living and maintenance in health. Five of the nine judges were of the opinion that such a law would deprive wage-earning women, who might otherwise be employed at less than a living wage, of a portion of the liberty guaranteed to them by the Fifth Amendment. They argued that the prohibition of employment at less than the authorized minimum wage was an unjustifiable interference with the workers' constitutional freedom of contract and hence a deprivation of liberty without due process of law. This was precisely the manner of reasoning adopted by the majority of the Court in the epoch-making New York Bakers' Case. In vain Chief Justice Taft in an able dissenting opinion called attention to an imposing array of cases in which the Supreme Court had sanctioned Congressional and legislative "interferences" with the "freedom of contract." In vain Justice Holmes reiterated his oft-expressed view that the liberty of the Fifth and Fourteenth Amendments was not intended to impair the right of the Federal and State governments to invoke the police power for the protection of legitimate public interests, but merely to prevent the abuse of the power for the promotion of interests of a private rather than public nature. The majority of the Court insisted that the enactment of a minimum wage law was no proper exercise of the police power. It could not be justified to them because they had identified in their own minds the juristic liberty of the Amendments with the realistic liberty of the utilitarian political philosophy. Such an "interference" with the "liberty" of working women and employers to do as they pleased in the matter of wages did not stand the utilitarian test of justice.

Judicial confusion of juristic and philosophical ideas of liberty

The decision in this case may be reconciled with the principles of justice and liberty held by the "Founding

Fathers," upon the theory that the majority of the Court believed the minimum wage law to be an abuse of power for a private, not a public, purpose. The difficulty with this theory is the narrowness of the majority by which the law was declared unconstitutional. Whether the employment of working women at excessively low wages is a purely private matter concerning only the women and their employers or is so affected with a public interest as to justify the use of the police power to prevent underpayment, is a question on which opinions differ. The Congress which enacted the minimum wage law and the President who approved it evidently thought that the unrestrained employment of women at excessively low wages was seriously disturbing domestic tranquillity, and that such a law was a reasonable expedient for diminishing the evil. But a bare majority of the Court thought otherwise. It is unfortunate that the Court should be so uncertain of its own mind in cases involving the important question whether or not a Congressional enactment can be supposed to serve a public purpose. Such uncertainty impairs the prestige of law not only, but also of the Court itself, the special guardian of the majesty of the law. It inevitably exposes the Court to the popular criticism that is appropriate for the political branches of the government, but cannot be extended to the judicial branch without injuring the authority of all law. Judges may protest that they are not concerned with the wisdom or expediency of legislation under the police power, but only with its constitutionality. Would not their judgments concerning the nature of the purposes, whether public or private, which may be supposed to animate the laws, command more ungrudging acquiescence, if not promulgated by such narrow majorities and accompanied by such weighty criticisms on the part of the dissenting judges?

"Idealistic" criticism of the judiciary

Impatient critics of the courts have offered another ex-

planation of this refusal to sustain police regulations which might seem to some judges to be unwise adjustments of conflicting private interests. They have asserted that the judges represent the interests of particular classes among the people, and interpret the Constitution in the manner most serviceable to those interests. They have even pointed out the particular interests which the judicial decisions have served. In the course of the political struggles over the use of the police power, arising out of the conflicts of interest between the farmers, the railroads, the middlemen, Wall Street, big business, small investors, skilled wage earners, unskilled wage earners, and ultimate consumers, to mention only a few of the outstanding conflicts, the judges, their critics allege, have served, now this interest, now that. How much truth there may be in this explanation must depend in part on the manner in which judges have been selected and the conditions under which they have exercised their powers. Such considerations as these, however, are more appropriate for a study of the government of the modern commonwealth than of its foundations. They relate rather to the means by which domestic tranquillity may be ensured than to the nature of this purpose of the people of a commonwealth.

"Realistic" criticism of the judiciary

It is enough to point out here that the police power is in practice merely one of the means—though the most important one—for establishing justice. If private rather than public purposes dominate its use in any particular state, the kind of justice that will prevail in that state will be better described by the realistic than by the idealistic theory of justice. Under such circumstances the kind of liberty that will be secured will seem to those members of the state, whose interests are neglected by its rulers, to be no liberty at all, but tyranny and oppression. Such a state might be a modern commonwealth, as that kind of state has been defined, despite the unsatisfactory nature of

Justice, liberty, and the police power

the liberty and justice obtained by its people, but it would be evident at least that its form of government and its processes of law were very imperfect.

NOTES ON BOOKS

1. The standard authorities on the liberties of Englishmen at the time of the Revolution and of Americans thereafter are Sir W. Blackstone's *Commentaries on the Laws of England* (1st ed., 4 vols., 1765-1769), and J. Kent's *Commentaries on American Law* (1st ed., 4 vols., 1826-1830; 14th ed., revised by O. W. Holmes, 4 vols., 1896).

2. On the constitutional liberties of Americans, as understood by the Founding Fathers, there should be added to the above J. Story's *Commentaries on the Constitution of the United States, with a Preliminary Review of the Constitutional History of the Colonies and States before the adoption of the Constitution* (1st ed., 2 vols., 1833; Cooley's 4th, 1873, and Bigelow's 5th, 1891, editions are the best). See also T. M. Cooley's *Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (7th ed., 1903), especially Chapters x and xi, which contain excellent discussions of the constitutional protection for personal liberty, as formerly understood, and of due process of law.

3. The most recent general treatise on the judicial interpretation of the Constitution is C. K. Burdick's *The Law of the American Constitution* (1922). W. W. Willoughby's *The Constitutional Law of the United States* (2 vols., 1910) is the most comprehensive treatise to the date of its publication. Much has been written in recent years on the judicial interpretation of the Fourteenth Amendment. See especially F. J. Goodnow's *Social Reform and the Constitution* (1911), and C. W. Collins's *The Fourteenth Amendment and the States* (1912). See also E. Freund's *Standards of American Legislation,* Chapter v (1917), and R. Pound's *The Spirit of the Common Law,* Chapters iv and vi (1921). The intention of the Congress which prepared the Fourteenth Amendment is carefully examined in H. E. Flack's *The Adoption of the Fourteenth Amendment* (1908).

4. E. Freund's *The Police Power* (1904) is the standard work on that subject. For recent developments in the law of the police power, see Burdick's book, noted above.

CHAPTER IX

THE COMMON DEFENSE

1

The war power

THE next purpose of the people of the United States in establishing their Constitution was to provide for the common defense. The power of a body of people to make such provision is usually termed the war power. War is commonly understood to be contention by force and violence between two or more organized bodies of people, and a state of war may be recognized as existing whenever a formidable organization of people pursues its interests by force and violence.

Its nature

The war power is by nature broad enough to embrace provision for offensive as well as defensive hostilities, but the language of the Preamble to the Constitution reveals a sentiment on the part of the "Founding Fathers" adverse to aggressive and unnecessary wars. The widest diversity of opinion has existed concerning the nature of the interests that may justify a resort to war. Lord Bacon once remarked that "nobody can be healthful without exercise, neither natural body or politic; and certainly, to a kingdom or estate, a just and honorable war is the true exercise."[1] Many have agreed with Bacon, some of whom have even omitted his qualification that the war should be just and honorable. But whatever may be thought by good citizens about the healthfulness of a just and honorable war, there can be no doubt of the right of the state to engage in such a war, except on the part of those who

[1] Sir Francis Bacon, *Essays*. No. XXIX, "Of the True Greatness of Kingdoms and Estates."

conscientiously object to any form of physical coercion in the conduct of affairs of state.

The justification of its use

The real difficulty for most good citizens is to determine what wars are just and honorable. Those who hold that the sovereignty of so-called sovereign states is without limit, and that the rulers of states have no responsibilities except to cherish their own interests or at most those of their fellow citizens or subjects, are bound to believe that a state may justly and honorably wage war whenever its government deems it advantageous to do so. Those who hold that there is a higher law for the guidance of humanity than that dictated by the interests of particular portions of mankind, organized as states, must conclude that war cannot be justified except upon universal principles of justice. It is outside the scope of this book to consider either the general theory of war or particular proposals for distinguishing just from unjust wars, such as those embodied in the Covenant of the League of Nations. What must be considered here is the connection between the purpose to provide for the common defense and the foundations of the modern commonwealth, and especially the relation between the right of a commonwealth to wage a just war and its duty to secure the blessings of liberty to its people.

Comparison of war and police powers

The war power is broad enough also to embrace provision for domestic as well as foreign wars. Domestic and civil wars, however, narrow down into hostilities of uncertain character, such as those directed against loosely organized insurrections and unpremeditated local riots. Thus the war power merges into the police power, and it is not easy to draw any clear line between them. Both alike involve the use of force to overcome force. Each accomplishes its purpose, when exerted to its full extent, by imposing physical restraints upon the persons against whom it is invoked. Each imposes legal restraints upon

their right to do as they please. Each deprives individuals of liberty, in the realistic sense of the term, even if used properly, and, if abused, may deprive them also of liberty as it is defined by the political idealists. The practical operation of the war power, therefore, like that of the police power, illuminates the fundamental problems concerning the nature of liberty in the modern commonwealth. On the one hand, the liberty of the people is to be enjoyed upon such conditions as may be laid down by the government in the exercise of its police and war powers, and on the other, the common defense is to be provided for, as domestic tranquillity is to be insured, by methods that are not incompatible with popular liberty.

The war power and the problem of liberty

The blessings of liberty, it is hardly necessary to add, must be as much an object of political action in war as in peace, if the state is to qualify as a modern commonwealth. Certainly there is nothing in the Preamble to the Constitution of the United States to indicate that the purpose of the people to secure the blessings of liberty was less firm than that to provide for the common defense. In this respect the latter was on the same footing as the purpose to insure domestic tranquillity. The limitations upon the police power apply with the same force, as far as they are applicable at all, to the war power. The specific juristic liberties of the people, as far as they are protected against one of these powers, are equally protected against the other. Foremost among these are the fundamental or absolute rights, as Blackstone called them, of personal security, personal liberty, and private property, of which no person may be deprived without due process of law. Many others are specified in the Federal and State Constitutions. Of these others none is more important than those which protect the members of the state in the expression of their opinions, and in their access to the opinions of others and to the information upon which intelligent

public opinion must be based. Because intelligent and effective public opinion is the very essence of popular government, the protection of its sources and channels of expression is, next to the protection of the people themselves, the most important duty of the government of the modern commonwealth. Hence the prominence of the rights of free speech and of a free press, of public assembly and of petition, in the revolutionary declarations of rights. Of these particular rights or liberties, the freedom of speech and of the press has received the most attention in modern times. Its history both in peace and in war (but especially in war, because then the temptation to abridge it is strongest) affords the best commentary upon the nature of the liberties, other than those of the due-process clauses, which the people of a modern commonwealth wish to secure. Its history in time of war should also illuminate the war power itself, since nothing better illustrates the nature of a power than the conflict of power with right.

Significance of the history of the freedom of the press

2

Freedom of the press in the original State constitutions

The right to freedom of the press is asserted in all the original declarations of rights adopted by the States during the course of the Revolution. Virginia, the first State to adopt an independent constitution with a declaration of rights, solemnly declared that "the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."[1] Massachusetts, whose declaration of rights was one of the last and most elaborate to be adopted during the revolutionary period, declared that "the liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restricted in this commonwealth."[2] The Massachusetts declaration added: "The freedom of deliberation, speech,

[1] Section 12.
[2] Article XVI.

and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."[1] But the Massachusetts declaration made no reference to a right of free speech outside the legislature, and Virginia asserted no right to freedom of speech anywhere. In Pennsylvania, however, the most democratic of the original States, the original declaration of rights asserted that "the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained."[2] Though several of the States did not originally adopt any declarations of rights, there can be no doubt that it was the intention of the people throughout the Union to include the liberty of the press, whatever may be the case as to a general freedom of speech, among the blessings of liberty which they sought to secure.

Freedom of the press in the Federal Constitution

There is further evidence for this view in the treatment of the subject in the Federal Constitution. The Convention of 1787 considered the insertion of an express guarantee of the liberty of the press in the fundamental law, but rejected the proposal on the ground that no power was delegated to the Federal Government which could be used to abridge that liberty. There were grave doubts on this point, however, in the minds of many of the "Founding Fathers," and one of the earliest acts of the first Congress under the new Constitution was to submit to the States the series of amendments which contained among others the explicit provision that the Congress should make no law abridging the freedom of speech or of the press.[3]

The intention of the people to secure the blessings of

[1] Article XXI.
[2] Article XII.
[3] Article I of the amendments.

What is the freedom of the press?

Blackstone's view

the liberty of the press is clear, but it is not so clear precisely what they meant by that liberty. Blackstone, the best authority on this as on other questions relating to the contemporary understanding of English and American liberties, treats the subject in connection with his discussion of offenses against the public peace. Having disposed of riots, routs, and unlawful assemblies, he proceeds to consider tumultuous petitioning, going armed with dangerous weapons, spreading false news, false and pretended prophecies, challenges to fight, and libels. In all these cases the offense consisted, not in an actual breach of the peace, but in the tendency to provoke or excite others to break it. Challenges to fight are so obviously acts of speech or writing or printing, tending to provoke or excite breaches of the peace, as not to require much comment, though there is room enough for debate concerning the expediency of penalizing the mere act of challenging, where no duel or other physical encounter ensues. Libels, that is, malicious defamations of any person, made public by printing or otherwise, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule, are very similar to challenges to duels in their tendency to provoke breaches of the peace. Blackstone observes that they may stir up the objects of the libels to revenge and perhaps to bloodshed. And so libelers may be punished by fine and imprisonment, like other disturbers of the peace. Blackstone then remarks that "where blasphemous, immoral, treasonable, schismatic, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."

Blackstone's further observations on this subject, after

Comparative liberality of Blackstone's view

the lapse of more than a century and a half, are still interesting and instructive: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution,[1] is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon the freedom of thought or enquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. . . . And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, 'that it was necessary to prevent the daily abuse of it,' will entirely lose its force, when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable

[1] That is the English revolution of 1688. It should be noted in this connection that the art of printing, soon after its introduction, was looked upon in England, as well as in other countries, as a matter of state, and subject to the control of the Crown. This control was exercised at different times by royal proclamations, charters of privileges, acts of parliament, and finally by star-chamber decrees, until the licensing acts were allowed to expire in the time of King William III. From that time to the American Revolution the liberty of the press existed in England by tacit toleration, but not by express enactment.

punishment: whereas it never can be used to any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press."[1]

Licensed printing in the North-American colonies

Blackstone's view of the nature of the liberty of the press was a liberal one for his day and generation. This is evident when the history of the press in the North-American colonies is taken into consideration.[2] The first printing press was set up in Cambridge in 1639. From 1641 it was managed by the President of Harvard College, an institution originally established by the General Court and closely supervised by the magistrates of the colony. Nothing appeared from that press to which there could be any objection on the part of the authorities. The Puritans recognized no general right to freedom of discussion either in Old or New England, while they were in control of public affairs. Though a man of rare enlightenment like John Milton might write a noble protest against the censorship, such as the *Areopagitica, a Speech . . . for the Liberty of Unlicensed Printing,* the temper of the time was hostile to such a liberty. The Puritans in New England did not need a licensing system, like that adopted by the Long Parliament, to protect themselves against disorderly printing, until the first commercial press was established in Boston after the restoration of the Stuarts. Then (1665) the General Court set up a board of licensers with powers like those exercised by the English authorities under the Licensing Act of Charles II. It is significant that the President of Harvard College was a member of the original licensing board. This system was maintained down to the eighteenth century. In Pennsylvania, where a printing press was set up in 1685, the printer was commanded to publish nothing

[1] *Commentaries,* Book IV, chapter 12.
[2] Cf. C. A. Duniway, *Freedom of the Press in Massachusetts.*

without license from the executive council. Discouraged by vexatious restrictions, he quit the colony in 1693. In the other colonies there could be no question of any liberty of the press during the seventeenth century, because there was no press. In Virginia indeed at least one royal governor[1] was expressly instructed "to allow no person to use a printing press on any occasion whatsoever."

Regulation of the press by prosecutions for libel

In the eighteenth century the censorship of the press was relaxed in the colonies as in the Mother Country. The royal governors were growing more and more unpopular. They became involved in perennial controversies with the colonial legislatures, and the latter were indisposed to sanction executive interference with the freedom of the press to criticise the representatives of the Crown. Unable to maintain the censorship, the governors were forced to rely upon prosecutions for libel to prevent the abuse of the privilege of unlicensed printing.[2] Of these prosecutions for libel that of Zenger in New York acquired the greatest celebrity. This case, which was decided in 1735, was heralded at the time and has often been cited since as a vindication of the liberty of speaking and writing the truth as one pleased, regardless of the consequences to those who might be injured thereby. But the court maintained the settled doctrine of the common law that the defendant could not plead the truth of an alleged libel in justification of its publication. Zenger's acquittal seems to have resulted from an adroit appeal by his counsel to the sympathies of the jury rather than from any modification of the law of libel in favor of a greater freedom of the press. While this case did not itself mark any liberalization of the law of libel, it certainly helped to create dissatisfaction with the common law as it then

[1] Lord Effingham, appointed in 1683. See Thomas, *History of Printing,* Vol. I, p. 332.

[2] See Duniway, *Freedom of the Press in Massachusetts,* Chapters VI, VII.

stood. Public opinion, however, was slow to change, and the right of the provincial authorities to discourage the bolder sort of newspaper critics by prosecutions for libel was generally respected.

The Stamp Act and the freedom of the press

It was not until the passage of the imperial Stamp Act in 1765 that the people became seriously concerned about the liberty of the press. The Stamp Act would have been a heavy burden upon printers, if it had been enforced, and the popular agitation which it aroused contributed greatly to the unsettlement of opinion concerning the proper bounds between liberty and license.

The law of libel on the eve of the Revolution

In 1767 Chief Justice Hutchinson of Massachusetts, disturbed by the licentiousness of the press, as it seemed to the royal authorities, took occasion in charging the grand jury to define the limits of its freedom. "Pretty high notions of the liberty of the press," he said, "have prevailed of late among us. . . . The liberty of the press is doubtless a very great blessing; but this liberty means no more than a freedom for everything to pass from the press without a license. . . . Unlicensed printing was never thought to mean a liberty of reviling and calumniating all ranks and degrees of men with impunity, all authority with ignominy. To carry this absurd notion of the liberty of the press to the length some would have it . . . is truly astonishing, and of the most dangerous tendency."[1] And again, a year later, he remarked to the grand jury: "Formerly no man could print his thoughts, ever so modestly and calmly, or with ever so much candor and ingenuousness, upon any subject whatever, without a license. When this restraint was taken off, then was the true liberty of the press."[2] This, of course, was identical with Blackstone's opinion and the recognition of such a liberty of the press obviously marked a great advance over

[1] Duniway, *Freedom of the Press in Massachusetts*, p. 125.
[2] Duniway, *op. cit.*, p. 128.

the ideas that had formerly prevailed both in England and in the colonies. But the grand juries would not find indictments against the publishers of the offending newspapers, and it became plain that the common law of libel could not be effectively used to protect an unpopular administration against offensive criticism.

Criticism of the old English common law of libel

Opposition to the rigorous enforcement of the law of libel inevitably led to criticism of the law itself. Under the common law the essence of a libel consisted in the bad intent of its publishers. A publication was not libelous, unless it was malicious as well as defamatory. But the royal and provincial judges were prone to infer malice on the part of the publisher, whenever the tendency of a publication seemed to them offensive and injurious. They would conclude that the intention of the publisher must have been bad, since the tendency of the matter published was objectionable. Having determined whether as a matter of law an objectionable publication was libelous, they would instruct the jury to decide merely, whether as a matter of fact it had been published by the defendant. The fact that an offensive statement might have been true was not admitted as evidence that it had been published with a good motive and for a justifiable end. If the matter published, whether true or false, was likely to produce mischief and disorder, the publisher, the judges were likely to hold, was not unaware that such would be the effect of its publication, and must have intended to accomplish the result which he knew his act would tend to bring about. Hence all hostile criticism of public officers, which threatened to arouse popular resentment and opposition to their conduct of public affairs, was liable to become the occasion of criminal proceedings, and the more vigorous and effective the criticism, the greater the liability. The truth of the criticism was irrelevant. The point of view of the royal and provincial authorities is accurately

indicated by the remark ascribed to one English judge: "Where vituperation begins, the liberty of the press ends." But the rebellious people of the colonies grew impatient of such a doctrine. They were disposed to claim that the truth of a publication ought to be sufficient evidence that it was published from a good motive and for a justifiable end, and therefore ought to be a sufficient defense against a charge of libel, at least in cases affecting public officers. And in order that their own opinions concerning the truth of hostile criticisms of unpopular officers might prevail, rather than those of the officers under criticism, as well as their opinions concerning the character of the motives of the critics and the justification of their ends, they were disposed to claim further that the juries should have authority to determine whether or not an alleged libel was libelous, and not merely the fact of publication.

Survival of the common law after the Revolution

Nevertheless, despite the unpopularity of prosecutions for libel by the provincial governors, the patriots, when they had conquered power, were slow to change the law itself. The revolutionary declarations of rights, as has been pointed out, generally included a right of freedom of the press, though not of free speech, but they refrained from defining the term. Presumably their authors did not intend to alter the established interpretation. After the adoption of the new State constitutions, however, libel cases were infrequent, and years passed before the nature of the constitutional liberty of the press was judicially determined. In Massachusetts the first case was decided in 1791.[1] The court then adopted the Blackstonian definition of the liberty of the press, the same that the royalist chief justice, Hutchinson, had maintained during the controversies over the Stamp Act before the Revolution; but the jury, as before, refused to convict. There can be no doubt that many of the people were dissatisfied with the

[1] Duniway, *Freedom of the Press in Massachusetts,* Chapter IX.

common law of libel, whatever may have been the views of the lawyers and judges, but in the formal opinions of the courts of justice the Blackstonian definition continued to hold sway.

3

Introduction of the modern liberty of public discussion in the Pennsylvania Constitution of 1790

The first State in which the popular view found its way into the fundamental law was Pennsylvania. The revised constitution, adopted in that State in 1790, not only contained the most perfect embodiment of the sober second thoughts of the "Founding Fathers" on the general form of government, but also provisions designed to safeguard the liberty of the press, which long served as a model for the other States of the Union.[1] The declaration in the Pennsylvania Constitution of 1790, relating to the liberty of the press, began by asserting "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof." It continued: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Thus the door was closed against any future censorship of the press, but no immunity was granted against punishment for disturbing the public peace by offensive publications. In order, however, to guard against arbitrary convictions in libel cases, it further provided that "in prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the

[1] Pennsylvania Constitution of 1790, Article IX, Section 7.

direction of the court, as in other cases." This progressive declaration preceded by two years the liberalization of the English law of libel by the adoption of Fox's celebrated libel act. That it faithfully reflects the opinion, then strongly tending to prevail in America, is shown by its general adoption in the constitutions of the new States of the old Northwest and Southwest, which were admitted to the Union during the next generation.

Relative importance of freedom of speech and freedom of the press in the early years of the Republic

Freedom of speech was a right of less concern to the men of the Revolution than liberty of the press. They could hardly claim a right to say anything in a public speech which they would not be equally free to publish to all the world under protection of their liberty of the press; and their right of free speech was further limited in practice by the limitations upon the right of public assembly, while there were no similar limitations upon the liberty of the press. The freedom of assembly was restricted by at least three limitations: first, people could not assemble for an unlawful purpose; secondly, they were bound to conduct their assemblies peaceably; and thirdly, they could not persist in assembling, if their assembly, though lawful and peaceable, would provoke such resentment in the community as to create a clear danger of uncontrollable disorder. According to Blackstone, for instance, the people had a right to assemble in order to petition the government for a redress of grievances, but they had no right to engage in tumultuous petitioning or to persist in assembling to the point of precipitating a riot. The English law provided that not more than twenty names should be signed to any petition to the King or either House of Parliament, praying for an alteration of matters established by law in church or state, unless previously approved by the proper local authorities, and that no petition should under any circumstances be delivered by a company of more than ten persons. While the men of the American Revolution,

having substituted the sovereignty of the people for that of kings, had no reason for such humility as was deemed proper for petitioners in England, and much less reason to fear the power of the mob in their sparse settlements and scattered plantations, and could therefore have safely set up a much more unrestrained freedom of speech, they were not unaware that the freedom of the press was a much more useful right to political propagandists and revolutionary agitators. Hence, since they drew up their declarations of rights while their experience as propagandists and agitators was fresh in mind, they boldly asserted their liberty of the press, but laid little stress on any right of free speech.

Federal Sedition Act of 1798

The state of public opinion with respect to freedom of speech and of the press in the early years of the Republic is illustrated by the history of the Federal Sedition Act of 1798. This impolitic measure was enacted into law by the Federalists in the midst of the popular excitement aroused by the breaking out of war with France. It subjected to the penalty of a fine of not more than $2000 or imprisonment for not more than two years any person who should publish any false, scandalous, and malicious writings against the government of the United States, or against the President or either House of the Congress, with the intent to defame them, or to bring them into contempt. or to excite against them the hatred of the good people of the country, or to provoke any unlawful combination for opposing any law of the United States or any lawful act of the President, or to arouse resistance in any manner to such law or act, or generally with the intention to aid the hostile designs of any foreign power against the United States. But it was provided that in all prosecutions under this act the truth of the matter published might be offered in evidence of a good motive and justifiable end, and that the jury might determine the character of the statements

objected to as well as the fact of publication. Finally, the act was to continue in force only until March 4, 1801. This act was bitterly denounced by the Republican party leaders, and became a leading issue in the presidential campaign of 1800. Its unpopularity contributed greatly to the defeat of the Federalists and to the triumph of the Jeffersonian Republicans. Many years passed before the enactment of this measure ceased to be a cause of reproach upon the Federalist party.

Growth of opinion more favorable to an unrestrained liberty of public discussion

It is not possible by a mere reading of the text of the Sedition Act of 1798 to understand the causes of its profound unpopularity. To be sure, the description of the language which it declares punishable as seditious is broad and leaves a good deal to the discretion of the authorities charged with its enforcement. Strictly construed, however, its provisions do not seem excessively severe, and were distinctly more moderate than the common law of libel, as it had stood before the Revolution and still stood in several States. The penalties were comparatively mild, and the final decision upon the character of alleged seditious utterances rested with the jury. Such an act was plainly not inconsistent with the popular view of the liberty of public discussion as set forth in the Pennsylvania Constitution of 1790. If enacted by any of the State governments, it must have been regarded as a liberal measure. The true ground for the fierce opposition to this act could not have been any deep repugnance to the particular restraints which it imposed upon the publication of hostile criticism of the government of the United States. One real objection is explained by the fact that these restraints were imposed by the Federal Government, although strict constructionists had supposed that under the Federal Constitution the power to regulate abuses of the liberty of the press had been reserved exclusively to the States. Its enactment, therefore, aroused the latent anti-Federalist

fears of excessive centralization in the government of the Union. Another objection—a very important one in the minds of practical politicians—sprang from the fear that the power to prosecute harshly critical journalists might be abused for partisan purposes. Republican party leaders undoubtedly were apprehensive lest Federalist officials under cover of the act should harass their party press. Nevertheless, judged by the canons of constitutional interpretation which have prevailed in the United States, it was clearly constitutional.[1] Judged by the more progressive opinion of the time, it was a good law, because it gave national currency to the doctrine that every man should be free to publish the truth with good motives and for justifiable ends, and that the jury should determine the character of questionable matter as well as the fact of publication. But it was bad politics, because the temper of the time was unfavorable to interferences by a partisan administration with the freedom of the opposition party press to criticize the conduct of public affairs. It is the temper of the time that is the best authority concerning the actual bounds between the public interest in freedom of discussion and that in peace and good order.

Expansion of the eighteenth-century freedom of speech and of the press into the nineteenth-century liberty of public discussion

Blackstone's definition of the liberty of the press has not been repudiated by the American judiciary. The common law of libel, however, has been universally moderated in the manner first prescribed by the Pennsylvania Constitution of 1790 and confirmed by the Sedition Act of 1798, and the liberal view of what is permissible in the way of criticism of public officers came generally to prevail. But in some of the older and more conservative States the more drastic rule of the common law survived, at least in the courts, well into the nineteenth century. In Massachusetts the Constitutional Convention of 1820 con-

[1] See Joseph Story, *Commentaries on the Constitution of the United States,* section 1886.

sidered a proposal to insert in the declaration of rights a provision to the effect that, in prosecutions for libel against public men, the truth might be offered in evidence of good motive and justifiable purpose, and that juries might determine the character of the matter published as well as the fact of publication. But no change in the constitution was deemed necessary, and afterward, as before, the State supreme court refused to permit the admission of the truth. It was not until 1827 that the State legislature finally enacted a law providing for the admission of the truth in evidence and for findings by the juries upon all the facts of a case. Thus the eighteenth-century freedom of speech and of the press was expanded into the nineteenth-century liberty of public discussion.

Chancellor Kent's opinion

In New York also the moderation of the law of libel was more slowly accomplished than in the newer and then more democratic states. Chancellor Kent declared that the weight of judicial authority undoubtedly was that the English common law of libel was the rule in the United States in all cases in which it had not been expressly altered by constitutional or legislative provisions. This distinguished jurist, moreover, still entertained some doubts concerning the wisdom of always admitting the truth in evidence in prosecutions for libel. "The current of opinion seems to have been setting strongly," he observed, "not only in favor of erecting barriers against any previous restraints upon publications (which was all that the earlier sages of the Revolution had in view), but in favor of the policy that would diminish or destroy altogether every obstacle or responsibility in the way of the publication of the truth." The subject, he continued, "is not without its difficulties, and it has been found embarrassing to preserve equally, and in just harmony and proportion, the protection which is due to character, and the protection which ought to be afforded to liberty of speech and of the press. These

rights are frequently brought into dangerous collision, and the tendency of measures in this country has been to relax too far the vigilance with which the common law surrounded and guarded character, while we are animated with a generous anxiety to maintain freedom of discussion."[1] But Chancellor Kent was confessedly behind the times.

Justice Story's opinion

Justice Story also warned against the dangers of extending too far the freedom of public discussion. He noted particularly a writer, an eminent Virginian jurist, who seemed to argue that the freedom of the press required that the press should not only be relieved of all previous restraints upon publication, but also of every kind of restraint. This writer apparently believed that the freedom of the press consisted in the complete absence of any possibility of subsequent punishment for maliciously injuring the reputation of another or inciting ill-disposed persons to disorder and violence. Having noted also that the State of Virginia had on more than one occasion boldly proclaimed that the liberty of the press ought not to be restrained, Story inquired: "Would such a declaration in Virginia prohibit the legislature from passing laws to punish a man, who should publish and circulate writings, the design of which avowedly is to excite the slaves to general insurrection against their masters, or to inculcate upon them the policy of secretly poisoning or murdering them? In short, is it contended that the liberty of the press is so much more valuable than all other rights in society, that the public safety, nay the existence of the government itself, is to yield to it? . . . No one can doubt the importance in a free government of a right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy and plans of government. This is the great security of a

[1] James Kent, *Commentaries on American Law*, Lecture XXIV.

free government. . . . But the exercise of a right is essentially different from an abuse of it."[1]

Popularity of the liberty of public discussion

So it came to be understood in the United States, not only that no law may rightfully be enacted to restrain or abridge the freedom of speech or of the press, but also that every citizen may speak, write, and publish his thoughts upon all subjects without fear of subsequent punishment, provided he does not abuse that right. Public opinion in America has remained steadfast in its support of the liberty of the press in the strict sense of the term; but a tendency has developed in recent years to rate the liberty of public discussion less highly than formerly. Throughout the first half of the nineteenth century, however, the opinion of the American people continued much more favorable to the liberty of public discussion than prior to the enactment of the Federal Sedition Act of 1798. After the Sedition Act expired by limitation in 1801, the government attested its contrition for that impolitic measure by refunding the fines that had been imposed under its authority. The War of 1812 was fought without any effort on the part of the Federal Government to repress the expression of opinion, although in certain sections there was a dangerous body of opinion strongly hostile to the conduct of that war.

The War of 1812

Causes of of the popularity of the liberty of public discussion

Both Chancellor Kent and Justice Story bore witness to the popular tendency at the end of the first quarter of the century to subordinate the interests of domestic tranquillity to those of publicity in public affairs. Such a tendency was natural to an independent and self-reliant people, largely absorbed in the development of a new country. Individual initiative and enterprise were the most important qualities for the task of pushing the frontier back into the western wilderness. A sparsely settled agricultural population had little to fear either from lawless mobs or from sporadic

[1] Story, *Commentaries*, sections 1880-1882.

disturbers of the peace. The disorderly elements in the community could often find a sufficient outlet for their surplus energies in aggression on the Indians. Despite the occasional mutterings about nullification and even secession, organized rebellion by force and violence was unthought of, and the danger of foreign invasion was remote. The bulk of the people had all the law and order they wanted for themselves, but they never got enough of public discussion. Distances were great, the means of transmitting intelligence were inadequate, and news was dear. Under such circumstances a high value was placed upon the liberty of public discussion and a low opinion was formed of that kind of peace and safety which depends for its existence upon the repression of unpopular activities by authority of law. Particularly objectionable characters, like Garrison and Lovejoy and the other early abolitionists, were occasionally mobbed, but in general agitators were tolerated, if not actually welcomed, as cheap contributors to the gayety of an otherwise dull and laborious existence. When public opinion could no longer tolerate the polygamous propaganda of Mormonism, people did not bother to suppress the published revelations of the Latter-Day Saints. They simply chased Brigham Young and his followers out into the desert.

The Mexican War

The limitation upon the exercise of the war power, resulting from the partiality of the people for their liberty of public discussion, was clearly revealed during the war with Mexico in 1846-47. The Mexican War was highly unpopular in some sections of the country, and those who were responsible for its origin and conduct were subjected to the most outspoken criticism. When James Russell Lowell put into the mouth of Hosea Bigelow the trenchant line, "Ez fer war, I call it murder," he certainly was not helping the recruitment of the army which was destined to

invade Mexico. Yet no responsible statesman ventured to propose a new sedition act.

4

Abuse of the liberty of public discussion during the Civil War

It was not until the Civil War that the abuse of the liberty of public discussion seriously disturbed the public peace and compelled the government to consider whether it should not be restrained in the interest of the public safety. At the outset the advocates of secession were permitted to speak, write, and publish freely. As Lincoln subsequently pointed out, most of the principal leaders of the Southern Confederacy were originally in the power of the Federal Government, and an arbitrary government could have made them prisoners of state. The organization of rebellion under such a government, had it been supported by public opinion in the North, would have been difficult. But public opinion certainly would not have sanctioned such a vigorous preference for the interests of law and order over those of publicity in public affairs. Later, when certain party leaders in the North carried to extreme lengths their verbal opposition to the policy of the Administration, the Government was sorely tempted to overcome the violence of language with the violence of arms. In March, 1863, General Burnside was commander of the military department of the Ohio. Among the population of his department, Southern sympathizers were numerous and had been made bold by the ill success of the Union forces in the late campaigns. The policy of emancipation, recently proclaimed effective, had alienated many of the War Democrats and had not yet shown its full power to breathe new vigor into the anti-slavery Unionists. It was one of the darkest periods of the war for the North.

Under such trying circumstances General Burnside issued his celebrated General Order No. 38. This unfortunate general, goaded by his recent failure in the field,

General Burnside's anti-sedition order

was eager to redeem himself by a brilliant record at his new post. He was particularly desirous of improving the morale of the civilian population, and evidently thought he could accomplish this by displaying extraordinary energy in the suppression of sedition. His order prohibited every kind of word or deed designed to give aid or comfort to the enemy. It declared in so many words that "the habit of declaring sympathy for the enemy will not be allowed in this department." It added: "It must be distinctly understood that treason, expressed or implied, will not be tolerated in this department."[1] This order evoked a storm of criticism. There was no clear authority of law for the prosecution of civilians by the military for any offenses, certainly not for alleged seditious utterances. If there had been such authority, it is questionable whether the habit of expressing sympathy for the enemy could have been punished as sedition. Expressing sympathy for a suffering, though erring, foe is not the same as expressing a hope that he will win. Indeed, all Christians are enjoined to love their enemies, and it would seem not improper for Christian Americans, at least, to profess sympathy for their fellow Americans, even while they fought them. And the threat to punish treason which existed only by implication was so manifestly unconstitutional as to defy justification. This high crime is plainly defined in the Federal Constitution, and there is no room for implying treason where no overt act has been committed. Even supporters of the administration recognized the impropriety of this order. The opposition denounced it in the strongest terms. Among others one Vallandigham, a prominent Ohio politician and former Democratic congressman, joined in the attack upon it. In an address to a Democratic meeting he declared that it was a base usurpation of arbitrary power, that he despised it, and spat upon it, and

The Vallandigham case

[1] Nicolay and Hay, *Abraham Lincoln, A History*, Vol. VII, chapter 12.

trampled it under foot. Proceeding next to speak of the Conscription Act, recently passed, he declared that men deserving to be free would not submit to such an encroachment upon their liberties. He referred to the President of the United States as "King Lincoln," and advised his audience to go to the polls at the earliest opportunity and hurl the tyrant from power. For such remarks he was dragged from his house in the night by a squad of soldiers, although they had no warrant for his arrest, and brought to General Burnside's headquarters, where he was tried by court-martial, convicted, and sentenced to incarceration for the duration of the war in a Federal fortress. Vallandigham thereupon issued an address to the people, declaring that he was thoroughly loyal to the Union and was being persecuted merely because he wished to save it by a different policy from that of the Lincoln Administration. In short, he insisted that he was a martyr to the cause of free speech and constitutional liberty.

Public criticism of policy of military arrests for abuse of privileges of citizenship

The arrest and conviction of Vallandigham aroused the most passionate opposition. The Democratic press was outspoken in its condemnation. Meetings of protest were called in all parts of the Union. To one of these meetings, held in Albany, New York, Horatio Seymour, the Democratic governor of that State, later a Democratic candidate for the presidency, addressed an open letter, denouncing the proceedings in the most vigorous terms. "It is an act," he wrote, "which has brought dishonor upon our country; it is full of danger to our persons and to our homes; it bears upon its front a conscious violation of law and justice. . . . The transaction involved a series of offenses against our most sacred rights. It interfered with the freedom of speech; it violated our rights to be secure in our homes against unreasonable searches and seizures; it pronounced sentence without a trial, save one which was a mockery—which insulted as well as wronged. . . . If

this proceeding is approved by the Government, and sanctioned by the people, it is not merely a step towards revolution—it is revolution; it will not only lead toward military despotism—it establishes military despotism. . . . If it is upheld, our liberties are overthrown. . . . The action of the Administration will determine, in the minds of more than one-half of the people of the loyal States, whether this war is waged to put down rebellion at the South, or to destroy free institutions at the North. We look for its decision with the most solemn solicitude."[1] The meeting to which this letter was addressed formally resolved to call upon the President of the United States to reverse the action of the military tribunal by which Vallandigham had been condemned, and to restore him to the liberty of which he had been unconstitutionally deprived. Thus the question was clearly raised, where the line should be drawn between the duty of the government to provide for the common defense and its duty to secure the liberty of the individual to speak, write, and publish his sentiments on public affairs.

Lincoln's defense of the policy of military arrests

President Lincoln did not evade the issues which this case brought so conspicuously to the attention of the people. He was too candid to pretend that Vallandigham was guilty of treason or of any other offense under the laws of the United States. He conceded that the case raised the naked issue whether the government had a general power in time of war to make arrests unauthorized by law, when deemed necessary for the public safety. He called attention to the large number of Confederate partisans in many of the loyal States and asserted that juries drawn in the ordinary manner would frequently have at least one member more ready to hang the panel than to hang the traitor. He pointed out that, though such

[1] Nicolay and Hay, *Abraham Lincoln, A History*, vol. VII, pp. 341-342.

men as Vallandigham could not be prosecuted as traitors, any person who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle. Yet this dissuasion, he conceded, might be so conducted as to be no definite crime of which any civil court could take cognizance. Referring to the provision of the Constitution, that the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it, he declared that that was precisely the present case—a case of rebellion where the public safety required the suspension. Referring to the charge that Vallandigham had been arrested for no other reason than words addressed to public meetings in criticism of the course of the Administration, Lincoln said: "If this assertion is the truth and the whole truth . . . then I concede that the arrest was wrong. But . . . he was not arrested because he was damaging the political prospects of the Administration, or the personal interests of the commanding general, but because he was damaging the army, upon the existence and vigor of which the life of the nation depends. He was warring upon the military, and this gave the military constitutional jurisdiction to lay hands upon him."[1]

Lincoln's theory of the war power

Lincoln stated his side of the case as strongly as it could be stated. "Long experience," he said, "has shown that armies cannot be maintained unless desertion shall be punished by the severe penalty of death. . . . Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none the less injurious when effected by getting a father, brother, or friend into a public meeting, and there working upon his feelings till he is persuaded to write the soldier boy that he is fighting in a

[1] Nicolay and Hay, *Abraham Lincoln, A History*, vol. VII, pp. 344-347.

bad cause for a wicked Administration. . . . I think that in such a case to silence the agitator and save the boy is not only constitutional, but withal a great mercy." He then stated clearly his belief that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in the absence of rebellion or invasion, the public safety does not require them. He continued: "The Constitution itself makes the distinction, and I can no more be persuaded that the government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not lawfully be taken in time of peace, that I can be persuaded that a particular drug is not good medicine for a sick man because it can be shown not to be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting that the American people will, by reason of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and *habeas corpus,* throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics, during a temporary illness, as to persist in feeding upon them during the remainder of his healthful life."[1]

Criticism of Lincoln's theory of the war power

This reply was unsatisfactory to Lincoln's critics. They asserted that, when he said he must continue to do so much as might seem to be required by the public safety, he was in effect setting up his arbitrary will in place of the law of the land. In Ohio the Democratic State Convention, reaffirming their devotion to the Union, nominated Vallandigham for governor, denounced the proceedings against him as a forcible violation of the Constitution, and sent a remonstrance to Washington demanding that Val-

[1] Nicolay and Hay, *Abraham Lincoln, A History,* vol. VII, pp. 347-348.

landigham be restored to his home. Accusing the President of claiming a right to alter the constitutional guarantees of individual liberty whenever in his judgment the public safety required it, the remonstrance continued: "If an indefinable kind of constructive treason is to be introduced and engrafted upon the Constitution unknown to the laws of the land and subject to the will of the President, whenever an insurrection or invasion shall occur . . ., what safety or security will be left for the liberties of the people?"

Lincoln on the suspension of the privilege of the writ of habeas corpus

In his reply to this remonstrance, Lincoln said: "You ask, in substance, whether I really claim that I may override all the guaranteed rights of individuals on the plea of conserving the public safety—when I may choose to say the public safety requires it. This question, divested of the phraseology calculated to represent me as struggling for an arbitrary personal prerogative, is either simply a question who shall decide, or an affirmation that nobody shall decide, what the public safety does require in cases of rebellion or invasion. The Constitution contemplates the question as likely to occur for decision, but it does not expressly declare who is to decide it. By necessary implication, when rebellion or invasion comes, the decision is to be made, from time to time, and I think the man whom, for the time, the people have under the Constitution made the Commander-in-Chief of their army and navy is the man who holds the power, and bears the responsibility for making it. If he uses the power justly, the same people will probably justify him; if he abuses it, he is in their hands to be dealt with by all the modes they have reserved to themselves in the Constitution." [1]

Though Lincoln believed that the arrest of Vallandigham was a valid exercise of the war power, he recognized that the better opinion among the people, Democrats and

[1] Nicolay and Hay, *Abraham Lincoln, A History,* vol. VII, pp. 352-353.

Republicans alike, valued the liberty of public discussion much more highly than General Burnside appeared to do. At the same time he was aware of the probable injury to the morale of the army, if he repudiated the action of the commanding officer of a military department in a matter of that kind. He made it clear that he considered the arrest impolitic, even though he was unwilling to reverse the decision of the officer who deemed it necessary. He preferred that in such a case the officer held responsible for the maintenance of order in the department should decide how the war power should be exerted and to what extent the requirements of the public safety should prevail over the rights of individuals. But he commuted the sentence from imprisonment for the duration of the war to banishment. Vallandigham was accordingly passed through the Union lines and delivered to the custody of officers of the Confederacy. Thence, with the aid of the Confederate Government, he eventually made his way to Canada. It was while still within the Confederate lines that he was nominated for governor of Ohio. Lincoln refused to permit Vallandigham to return in order to take part in the electoral campaign, except upon conditions which his campaign managers declined to accept. Defeated in this campaign, Vallandigham did not venture to leave his asylum in Canada until the summer of 1864, when he came back to Ohio, unmolested, and played a conspicuous part on the Democratic side in the presidential campaign of that year. Meanwhile, the Congress of the United States had passed an act of indemnity to protect Lincoln and his subordinates against legal proceedings in this and other cases where they were charged with abuse of power. Lincoln, however, did not see fit to prosecute Vallandigham further, and did not again sanction any interference by the military with the liberty of public discussion on the part of the opponents of the war.

Lincoln's disposition of the Vallandigham case

The expansion of the war power during the Civil War

It is evident that during the Civil War, despite the danger to the Union from the abuse of the liberty of public discussion, public opinion held the ground which it had taken at the beginning of the century. As the struggle became more severe and the issue more doubtful, the public safety required, in the judgment of the Lincoln Administration, more and more drastic action under the war power. Irredeemable paper money was issued and made a legal tender, though no authority to do so was expressly granted by the Constitution. Thus the public credit was supported by what were in effect forced loans from a reluctant people. A Conscription Act was passed, again without express authority by the Constitution. Thus men, who were unwilling to volunteer for military or naval service, were drafted and sent to the front. Though at first President Lincoln repudiated the action of General Fremont, who had begun to free the negroes held in bondage in the military department which he commanded, eventually he issued the Emancipation Proclamation, by which he sought to deprive all armed secessionists of their property in slaves. From the beginning of the war he ordered arrests to be made by the military authorities without regard for the civil tribunals claiming jurisdiction over the persons arrested, and presently the Congress put an end to the controversy over his power to make such arbitrary arrests by explicitly authorizing him to suspend the privilege of the writ of *habeas corpus,* whenever in his judgment the public safety should require it.

Refusal to adopt a second Federal Sedition Act

But at no time did the Congress seriously consider any proposals for legislation directly abridging the freedom of speech or of the press or the more general liberty of public discussion. It did not even make any law under the war power altering the law of peace with respect to the abuse of the latter liberty. The loyal people of the Union remembered the unpopularity of the Sedition Act of 1798,

whatever they may have thought of its constitutionality, and were plainly unwilling to sanction any special restraints upon the liberty of public discussion. Public opinion held that liberty too precious to be restrained, unless the danger to the public safety from an unrestrained liberty to criticize the government was more imminent than at any time during the Civil War. How much more imminent such danger to the public safety must have been before public opinion would have santioned any general sacrifice of the liberty of public discussion, no one can say.

The war power and personal liberty

Doubtless the liberty of public discussion was restrained in particular cases, as a consequence of the detention of persons under military arrest to whom the privilege of the writ of *habeas corpus* was denied by the President. The suspension of the privilege of the writ, however, does not of itself deprive the individual of his liberty of public discussion, though it may result in interference with his exercise thereof. The purpose of the suspension is to enable the executive to postpone the day when the rights of the individual will be adjudicated in the ordinary courts of law, and its immediate effect is to abridge the individual's right of access to the courts, if actually placed under arrest, thus depriving him of personal liberty without due process of law, as ordinarily observed both in peace and in war. It cannot fairly be said that he is deprived of his liberty of public discussion, unless the privilege of the writ is suspended improperly. But, while the liberty of abusive critics like Vallandigham to speak and write against the government may be incidentally curtailed without violence to the traditional American doctrine of freedom of public discussion, in consequence of arrest by military authority and of suspension of the writ of *habeas corpus,* it does not follow that the treatment of Vallandigham was, under the actual circumstances justifiable. Vallandigham was not only arrested without judicial warrant,

but was also tried and convicted of an offense not defined by any Act of Congress then in force, and banished from the Union without opportunity to appeal to the highest court in the land for a judicial determination of his rights.

The war power and the liberty of public discussion

This proceeding, as Lincoln rightly said, raised two questions: first, whether the war power was broad enough to protect the people against abuses of the liberty of public discussion, against which the ordinary peace-time police measures afforded inadequate protection; and secondly, how and by what means the war power should be invoked, when necessary and proper to invoke it. The former question may be summarily disposed of. The people are interested in maintaining both the liberty of public discussion and the public peace and safety. These two interests often seem to conflict with one another, and some authority must determine at what point one interest shall yield to the other. Under normal conditions abuses of the liberty of public discussion are defined and suitable penalties are provided by appropriate measures under the police power. In time of invasion or rebellion more drastic measures to suppress promptly abusive criticism of the government may be taken, if necessary, by the proper authorities under the war power. Both the police power and the war power are broad enough to enable the rulers of a state to accomplish the purposes for which people create and support a government and endow it with those particular powers. These purposes are to insure domestic tranquillity and to provide for the common defense. Under the Constitution of the United States there has been doubt in many cases how the police and war powers were divided between the State and Federal governments; but there can be no doubt that, however they may be divided, they are in their totality sufficient for their respective purposes.

The real difficulty is presented by the second of

Lincoln's questions. Any particular case in which an individual is accused of an abuse of his liberty of public discussion raises the same issue that arises in every case in which a police or war regulation of any kind is violated: Will the individual, if punished by fine or imprisonment, be deprived of property or liberty without due process of law? The only difference between a violation of a police regulation and that of a war regulation, so far as the liberty of discussion of persons not enrolled in the military or naval forces is concerned, results from the fact that, when in case of rebellion or invasion the public safety may require it, the privilege of the writ of *habeas corpus* may be suspended. Authority to suspend the writ under certain circumstances is granted because the people have recognized that the relative importance of their different interests varies in accordance with the variations of circumstance. Under such circumstances as are always imminent in case of rebellion or invasion, their interest in peace and safety may well for the moment transcend that in keeping open the usual channels of public discussion. It becomes necessary to strike a new balance between the two interests. By suspending the writ the process of adjusting the balance of interests is temporarily altered, and speeches or writings may be proclaimed abusive which under normal conditions would be deemed no abuse of the liberty of discussion. As long, however, as no restraints are imposed prior to publication, there is no abridgment of the freedom of the press, and as long as no improper restraints are imposed upon the liberty of public assembly, there is no abridgment of freedom of speech. For protection against abuse by the government of its power to balance the competing interests of the people in freedom of public discussion on the one hand and in public peace and good order on the other, the individual must look, not to the free-speech and free-press clauses of the Federal

The war power and due process of law

and State Constitutions, but to those which are the guarantee of due process of law.

The Milligan case

Whether or not Vallandigham was deprived of personal liberty without due process of law is, therefore, in the last analysis the most important matter for consideration. After the close of the Civil War those lovers of liberty who feared that the arbitrary acts of the Lincoln Administration, if left to stand unchallenged, might become an evil precedent for future times brought a case before the Supreme Court to test their legality. In this, the famous Milligan case,[1] the court was unanimously of the opinion that the power to suspend the privilege of the writ of *habeas corpus* did not confer any right to try and convict a person under arrest, to whom the privilege of the writ was denied, except in accordance with law. The trial and conviction of Vallandigham had not been authorized by any law. Hence, although his arrest may have been a proper exercise of the war power, his banishment from the Union was certainly an act of despotism. Lincoln's defense of his suspension of the writ of *habeas corpus* in the earlier part of the war, without waiting for authorization from the Congress, on the ground that the danger to the public safety was such as to make further delay imprudent, seems reasonable. The Constitution expressly contemplates such a contingency. But to plead the maxim, *salus populi suprema lex,* in support of his action in the Vallandigham case, was stretching the bounds of the war power too far. The war power, like the police power, must be exercised in conformity with the requirements of due process of law. There was no pretense that such requirements had been complied with in the trial and conviction of Vallandigham. Nevertheless, there can be no doubt that the proper authorities have the right under the war power to declare such speeches as his to be abusive,

[1] *Ex parte* Milligan, 4 Wall. 2 (1867).

and to provide in a proper manner for trying and punishing such persons as he, if necessary for the public safety.

Toleration of the abuse of the liberty of public discussion

After the Civil War, as Lincoln had predicted, the prevailing opinion in the United States was no more favorable to the restraint of the liberty of public discussion than before. What had become by this time the traditional American policy with respect to the abuse of the liberty of public discussion was well expressed in a dissenting opinion which Justice Holmes subsequently handed down in one of the free-speech cases growing out of the World War. "Persecution for the expression of opinion," he said, "seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[1] This was the policy for which Jefferson had pleaded in his First Inaugural. "If there be any among us," he said, "who wish to dissolve this Union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

The stability of the government at the close of the nineteenth century afforded convincing evidence of the sanity of Jefferson's faith that it is better to tolerate the abuse of

[1] Abrams *vs.* United States, 250 U. S. 616 (1919), at p. 630.

the liberty of public discussion than to try to prevent it by invoking the war and police powers. But there can be no question of the power of the Federal and State governments to prevent the abuse of that liberty. The justification for the use of the power is undoubtedly greater in time of war than in time of peace, because war opens dangers that do not exist at other times. The principle, however, is the same in war and in peace. It is only the present danger of immediate evil, or an intent to bring it about, that warrants the Federal or State governments in setting a limit to the expression of opinion, where private rights are not concerned.

5

The liberty of public discussion in recent times

Down to the close of the nineteenth century domestic tranquillity was undisturbed by any dissensions so violent as to suggest any limitations upon the public criticism of public men other than those imposed by the settled law of libel. During most of this period there was little apprehension of foreign war and scant provision for the common defense against alien enemies. Toward the close of the period, during Cleveland's second administration, came the Venezuela embroglio with Great Britain, then under McKinley the war with Spain, and finally American participation in the allied expedition to suppress the Boxer insurrection in China. But these episodes, though transforming the United States from a regional into a world power, and greatly increasing the need of providing for the common defense, did not produce any immediate conflict between the public interest in free speech and a free press and that in the national security. It was not until the twentieth century that the trend of opinion in the United States became less favorable to such an unrestrained liberty of public discussion.

There were three causes for the change of opinion with respect to the relative importance of the public safety and

security on the one hand, and on the other of the liberty of public discussion. The first was the growing antagonism between labor and capital, resulting from the rapid development of large-scale industry and of class-conscious labor organizations. This led to new applications of old rules of law, designed to prevent what seemed to the capitalist class and at least a portion of the disinterested public new abuses of the liberty of public discussion. A leading case in evidence of the new tendency to look with less favor upon the unrestrained expression of opinion, regardless of injury to others, was that of the Bucks Stove and Range Company.[1] In this case the opinion of the Supreme Court sustained the right of a lower court to enjoin the principal officers of the American Federation of Labor from publishing in their official journal statements intended to induce wage earners to boycott the products of a certain iron foundry, whose proprietors were particularly obnoxious to them. On technical grounds, however, the punishment meted out by the lower court for contempt, because of the violation of its injunction in this particular case, was set aside. The Supreme Court properly rejected the claim by these labor leaders that immunity against punishment for the publication of "unfair" and "we don't patronize" notices, regardless of their motives and purposes, was a part of the constitutional freedom of the press. But, in rejecting also the claim that the publication of such notices was not an abuse of the freedom of public discussion, the Court established a precedent in favor of the interests of trade and against those of the free play of opinion. It was manifest that the courts would not permit the leaders of organized labor to use their right to speak and print their opinions concerning the fairness of businessmen, soliciting the patronage of the public, for the purpose primarily of injuring the business of such men, even if their ulterior pur-

Less favorable opinion toward the liberty of public discussion in recent times

Causes of change: 1. Strained relations between capital and labor

[1] Gompers *vs.* Bucks Stove and Range Co., 221 U. S. 418 (1911).

pose was to protect the interests of the members of their organizations when engaged in industrial disputes.[1]

The judicial censorship of public speech and of the press in connection with labor disputes

These cases introduced a new phase of the struggle for the liberty of public discussion. The issuing of injunctions to prohibit the spreading of reports concerning the alleged unfairness of objectionable employers seemed to wage earners but another form of the seventeenth-century censorship of the press, and one designed to favor the interests of capital over those of labor. Labor leaders were alarmed lest they be unable to protect the interests of the wage earners in industrial disputes with hostile employers, and demanded more adequate safeguards for the free expression of opinion. The employers who sought such injunctions, however, claimed that they were necessary to prevent irreparable injury to their property from unlawful boycotts and strikes. An attempt to strike a fresh balance between the interests of capital and of labor was made by the Clayton Act in 1914. This act provided that no injunction should be granted in a case growing out of an industrial dispute, unless necessary to prevent irreparable injury to property, for which there would be no adequate remedy in the ordinary course of the law. This of course was merely a re-enactment of the rule of the common law. The Act further provided expressly that, subject to certain limitations, no such injunction should prohibit any person from recommending or persuading others by peaceful means to cease work or strike. The intention of the Congress to prevent the development of any new form of censorship of speech or of the press through the exercise of the power of injunction by the courts seems clear. Nevertheless, in 1922, the Attorney-General of

[1] In thus setting up a judicial censorship of the press, however, the courts were not necessarily discriminating against wage earners as a class. They also asserted the power to censor publications in cases involving members of other classes. Cf. Paterson *vs.* Colorado, 205 U. S. 454 (1907).

the United States obtained from a lower court an injunction designed to prevent members of certain unions of railway workers, then engaged in a protracted and distressing strike, from saying or printing anything likely to obstruct the movement of trains engaged in interstate commerce or in the carrying of the mails. Public opinion did not sanction the policy of this proceeding, but it is evident that official opinion at least had become more favorable to the control of speech and of the press by official authority than at any time during the nineteenth century.

Second cause of changed opinion toward the liberty of public discussion: revolutionary propaganda

The second cause of the change of opinion in the twentieth century was the alarming increase in the number of agitators advocating political or social revolution by physical force and violence. In 1901 President McKinley was assassinated by a weak-minded youth under the influence of virulent anarchistic propaganda. This calamity aroused the people to the necessity of making better provision for the safety of public officials, even if that of the public itself was not yet seriously menaced. For a time the Federal Government was content to forbid alien anarchists to enter the United States. Then a further step was taken by utilizing the power to exclude objectionable matter from the mails. There had been no question of the right of the Federal Government to exclude indecent and obscene matter from the mails, and in the latter part of the nineteenth century the Anti-Lottery Acts, designed to close the mails to lotteries and similar gambling enterprises, had been adopted by the Congress and sustained by the Courts. Earlier in the century President Jackson had recommended the enactment of legislation to exclude from the mails inflammatory abolitionist literature, designed to incite the slaves to insurrection against their masters, but the Congress had rejected the proposal partly on the ground that it would violate the liberty of the press. The right to distribute publications through the mail or other-

wise seemed as essential to the liberty of the press as the right of printing the publications in the first place. But the successful exclusion of certain kinds of matter from the mails eventually suggested the exclusion of other kinds to which public opinion had become hostile. In 1911 the Congress passed an act providing that the word "indecent," as used in the law excluding such matter from the mails, should include matter of a character tending to incite arson, murder, or assassination. Thereafter violent anarchistic or socialistic literature could not be circulated through the mails, whether lawfully published or not, if deemed by the Postmaster-General likely to have a bad tendency. Under modern conditions such a power, as far as applicable, is nearly as effective as a revival of the censorship would be for the suppression of publications which are objectionable to the public officials.

Exclusion of violent propaganda from the mails

The menace of Bolshevism

The alarm at the growth of revolutionary agitation in the United States was increased by the initial success of the Bolshevist revolution in Russia. The political triumph, which the advocates of a universal proletarian revolution by physical force and violence had achieved there, they intended to repeat in every capitalistic state. The long cherished plan for the transformation of capitalism into communism, which they immediately proceeded to execute wherever the authority of the Soviets or of the Third International was recognized, they expected presently to carry into effect in America. What the Communists expected to do, many Americans feared that they might. In their alarm they forgot the proud dictum of Jefferson. They forgot also the noble faith of Milton: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"

Criminal anarchy and criminal syndicalism laws

Even before the triumph of the Communists in Russia there had been some legislation in the States to repress the dissemination of unpopular doctrines. Several States, for example, had passed so-called red flag laws, forbidding the display of the traditional emblem of disorder and violence in public processions and parades. The ostensible justification of such measures was the necessity of protecting the people in the undisturbed use of the public ways and, in exceptional cases, against the danger of uncontrollable riots which might be precipitated by the open display of the red flag. But it is doubtful whether it was really necessary for the protection of the people to prohibit in advance every public display of the incendiary banner. Certainly public opinion, as reflected in these laws, was much less tolerant than in former times, and this rising intolerance found expression in a flood of legislation when the peril of Bolshevism was felt to be imminent. These repressive measures, frequently called criminal anarchy or criminal syndicalism laws, were designed to check the abuse of the liberty of public discussion by the advocates of a political or social revolution by physical force and violence, and generally provided severe penalties for incitement to political crimes and attempts to organize active resistance to the constitutions and laws. Some of them went further, penalizing the use of language which might merely tend to cause an outbreak of violence, without other proof that such was the actual intention of the accused. After the close of the World War Congress was asked to set the seal of national approval upon this legislation by passing a permanent peace-time national Sedition Act. The proposed Act defined certain specific abuses of the liberty of public discussion, including advocacy of the unlawful injury of property and sabotage. This measure was stoutly opposed by those who believed in the traditional American liberty of public discussion and ultimately failed of

adoption. Provision was made, however, for the deportation of aliens holding any of the proscribed opinions. Public opinion in America had traveled a long road since the outcry against the Alien and Sedition Acts of 1798.

Third cause of changed opinion toward the liberty of public discussion: the World War

The third cause of the change of opinion with respect to the importance of the liberty of public discussion was the public danger springing from the Great World War. In the beginning opinion in America was divided concerning the merits of the controversy between the Entente and the Central Powers. Americans of European origin or descent naturally sympathized to some extent with that side on which their native land or the land of their forefathers was engaged. Many Americans were indifferent, and most Americans were indisposed to take any active part in the struggle. The official policy of the Federal Government was one of neutrality in word and in deed. Gradually, as the issues became clearer and American interests became more and more involved, neutral sentiment tended to crystallize in favor of the Entente, but both sides continued to have their devoted partisans. There were millions of persons in the United States who had been citizens or subjects of the Central Powers, many of whom were still aliens and presumably loyal to their own country. Under these circumstances the entrance of the United States into the war on the side of the Entente converted a large number of persons within the country into alien enemies. Many of these occupied strategic positions in the mines and workshops of the country, in the transport service, or on the farms. It was uncertain to what extent they would manifest an unfriendly disposition toward the Government of the United States. There was, indeed, much in the circumstances of American participation in the recent struggle to recall the conditions of the Civil War. The administration, however, did not ask for authority to suspend the privilege of the writ of

habeas corpus. Instead, it revived the policy of the French War of 1798. In 1917 an Espionage Act was passed to prevent the spreading of false reports about military operations, the incitement of insubordination in the military or naval forces, and the obstruction of recruiting; and in 1918 amendments were adopted which, until repealed in 1921, in effect constituted a new Federal Sedition Act.

The Espionage Acts of 1917-18

The war measures of 1917-1918 were much less tolerant of the expression of unpopular opinion than the Sedition Act of 1798. The later enactments prohibited, for example, all disloyal or abusive language about the form of government of the United States, when the United States is at war, as well as language intended to bring the form of government into contempt or disrepute. Thus any strong adverse criticism of the form of government might be unlawful, even though uttered with good motives and for justifiable ends, if "abusive." Moreover, it was declared unlawful "by word or act" to "oppose the cause of the United States" in any war in which the United States might be engaged. It is not clear how far this provision was designed to go in preventing loyal citizens from expressing their opinion of a war in which their country might be engaged, if they believed it to be unjust. Presumably, loyal citizens were not to be deprived of their right to urge the government to desist from an unjust war and make an honorable peace, but the language was broad, much broader than anything proposed at the time of the French War of 1798. Such a measure would not have been supported by public opinion during the Mexican or Civil Wars. But during the World War public opinion supported, not only these drastic provisions, but also their enforcement by very severe penalties. Persons convicted of their violation might be fined $10,000 on each count, as against $2000 under the Sedition Act of 1798, or might be imprisoned for twenty years, as against not more than

two years under the earlier act. Furthermore, the Postmaster-General was directed to exclude from the mail any matter which might not be lawfully published under the acts. In the exercise of this censorship, which in many cases would be practically equivalent to a censorship of the press, he was authorized to act upon evidence satisfactory to him without any judicial review of the correctness of his findings. In other cases the accused was entitled to a trial by jury, as under the Act of 1798.

The intolerance of public opinion toward unfriendly criticism of the government

The best evidence of the popularity of this repressive legislation is the ease with which convictions were obtained. Not only were notorious pro-German agitators convicted for openly inciting young men liable to conscription to resist the Selective Service Act, but also conscientious pacifists whose only offense consisted in preaching publicly the doctrines of non-resistance and opposition to war. There were also numerous convictions of socialists, communists, and syndicalists, including most of the leaders of the Industrial Workers of the World, whose opposition to the war was an incident of their general opposition to modern capitalism. The most conspicuous case was that of Eugene V. Debs, four times the Socialist candidate for the presidency, who was prosecuted for a speech which, it was charged, was intended to obstruct recruiting. Debs was of the opinion that all war was murder and therefore objectionable. This one was particularly objectionable because waged, he believed, in the interest of the capitalist class alone. He admitted that his remarks would tend to restrict recruiting, but justified them on the ground that they were designed to set forth the principles which the Socialist party held in war as well as in peace. His position was in many respects comparable to that of Vallandigham in the Civil War. His conviction was sustained by the Supreme Court in accordance with the general principle that, "when a nation is at war, many

things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and no court could regard them as protected by any constitutional right."[1] In general, the question to be determined in such cases is, whether the alleged abusive language is of such a nature and is used under such circumstances "as to create a clear and present danger" that they will bring about the particular evils which, under the war power, the proper authorities have a right to prevent. It is, as Justice Holmes said, "a question of proximity and degree." Such questions must be answered by the juries, and during the recent war the juries showed themselves very intolerant of unfriendly criticism of the government.

Necessity of a return after the World War to a peace-time point of view

After the World War, as after the Civil War, it was necessary for liberty-loving Americans to protest against much that had been done in the interest of the public safety during the heat of the struggle, lest ill-considered actions stand unchallenged as precedents for future times. But there was an important difference between the circumstances at the close of the two wars. In the Civil War the action that required reconsideration was that of the President in disregarding the Constitution under the persuasion that military necessity released the war power from all constitutional restraints. In the World War it was that of the local prosecutors and juries in failing to make due allowance for the natural variations of opinion among a loyal people. Learned and eloquent writers like Professor Chafee courageously pointed out the cruelty of some of the war-time convictions and wisely urged the importance of a return to the more tolerant attitude toward irresponsible critics of public men and public measures inculcated by Jefferson and his associates and maintained by the people throughout the nineteenth century.[2] But public

[1] Cf. Justice Holmes in Schenk *vs.* United States, 249 U. S. 47, at p. 52.
[2] Z. Chafee, *Freedom of Speech,* New York, 1920.

opinion was less disposed to condemn the excesses of the local prosecutors and juries in the World War than the Supreme Court had been after the Civil War to condemn those of the Lincoln Administration.

Public opinion and due process of law

Professor Chafee himself seems to argue that it was the duty of the Supreme Court to condemn also the excesses of the local prosecutors and juries. But that is a mistake. The errors of the organs of public opinion must be corrected by public opinion itself, not by the courts of law. The latter can enforce due process of law on those who are charged with its administration. They can even make sure that the war or police power is not used for any but a public purpose. But they cannot enforce due discretion upon the public which imparts to the enactment and administration of the law its temper and spirit. The proper remedy for the grievances of such men as Debs was not a denial of the right of the jury to convict them under the law. That would have been a return to the oppressive practice before the American Revolution and in the early years of the Republic, when juries were permitted to determine the fact of publication in prosecutions for libel, but not the character of the publication itself. The remedy for honest errors of judgment on the part of the jury is the power of pardon, and this was properly exercised, though not without vexatious delay, in favor of Debs and other political prisoners. The revival of tolerance for unpopular opinions, which presently set in, is reflected in the failure of a jury in the spring of 1923 to convict the radical agitator, W. Z. Foster, under the Michigan criminal syndicalism law.

The ultimate limits of the war power

The adjustment of the relations between the liberty of public discussion and the requirements of the common defense is a problem of the same kind as that of adjusting the relations between the liberty of public discussion and the requirements of domestic tranquillity. The

war power, like the police power, enables the state to accomplish certain of the purposes which are the foundations of its existence. States insure domestic tranquillity by imposing salutary restraints upon the conduct of refractory individuals and mobs. They provide for the common defense primarily by imposing, or making suitable preparations for imposing, restraints upon the conduct of hostile states or organized bodies of hostile persons within the state. The war power, however, like the police power, in order the more surely to gain its ends, often imposes incidental restraints upon the conduct of loyal citizens. During the World War, for example, it was deemed expedient to regulate the distribution of food and fuel, to control the operation of transportation and shipping facilities, to supervise the investment of private capital, to limit the consumption of materials and supplies in non-essential industries, to fix the prices of basic commodities, to take for public use the excess profits of the nation's businessmen, to conscript the serviceable young men for the actual fighting, and in many other ways to restrain the activities of private individuals in order to provide more effectually for the common defense. Not only the United States, but all the warring Powers, became for the duration of the war collectivist states. But the restrictions upon individual enterprise did not necessarily mean a loss of political liberty. The exercise of the war power, like that of the police power, is not incompatible with the security of individual rights. The requirements of liberty, like those of the public safety, depend upon the circumstances of each particular case. Bodies of people, living a common political life, are interested in both liberty and safety. The state, which exists in order to cherish both of these social interests, must be trusted to adjust the balance between them. The modern commonwealth is not a state in which either is unduly sacri-

ficed to the other. It is one in which the balance is struck by a government sustained by the organized opinion of its people. When so sustained, there is no ultimate limit to the war power, any more than to the police power, except that imposed by the requirements that it be exercised for a public purpose and with due process of law.

The true nature of the freedom of speech and of the press and of the liberty of public discussion

Freedom of speech and of the press, as the expressions are now commonly understood in America, is a complex liberty. It includes one seemingly unqualified right, that of speaking or printing one's opinions on public men and public affairs without the previous permission of any public authority. But it does not include the right to speak at an unlawful assembly, or to circulate one's written or printed opinions through the mails, if such circulation is contrary to public policy. Under modern conditions it is a much less substantial right than the freedom of speech and of the press enjoyed by the men of the early nineteenth century. The more important part of the freedom of speech and of the press, as commonly understood, is the right not to be punished for the abuse of the liberty of speaking or printing one's opinions without due process of law. But this is also a part of one's right of personal liberty. It is not a substantial, but merely a procedural, right. It does not operate as an absolute limitation upon the police power or the war power. It operates as a conditional limitation. The liberty of speaking or printing what one pleases without previous censorship may be restrained by suitable penalties imposed under the police power or the war power, whenever the proper authorities deem it necessary to check abuses. All that the individual can demand is that the restraints be imposed by laws duly enacted for a public purpose and enforced with a due regard for the established process of trial and conviction.

Thus freedom of speech and of the press, like personal liberty, proves to be nothing that one can define in unquali-

fied terms. It is fundamentally no more than the uncertain result of a process for giving effect to the dominant opinion in the state. It is what that opinion permits, provided that the permission is not withheld in an improper manner. Even the most substantial part of the liberty of speech and of the press, the absence of any censorship other than that of the Postmaster-General, may be withdrawn by the process of amending the Constitution. Like all specific juristic liberties, it is in the last analysis merely one aspect of political liberty, a part of a people's liberty to obey just laws. The fundamental consideration is the character of the justice that prevails in the commonwealth. If the justice that actually prevails is but another name, as the realistic theory of justice implies, for the adjustment of the conflicts of interest within the state with an eye to the advantage of its rulers or of a dominant class, the liberty of public discussion possessed by the members of other classes will be insecure indeed. But if justice means what the idealistic theory declares it to mean, liberties of every kind will have the same significance for all. Which kind of justice will prevail in a modern commonwealth must depend, partly, to be sure, upon the strength of purpose of the people, but partly also upon the form of organization of the government and the nature of the processes for converting opinion into law.

NOTES ON BOOKS

1. A good recent discussion of the power to conduct war under the American Constitution is C. A. Berdahl's *War Powers of the Executive in the United States* (1921). The exercise of the war power in the United States during the Great War is illustrated by J. H. Wigmore's *Source Book of Military Law and War Time Legislation* (1919). For a general introduction to the literature of militarism and pacifism down to the entry of the United States into the Great War, see E. Krehbiel's *Nationalism, War and Society* (1916).

2. The best authorities on the contemporary understanding of freedom of speech and of the press after the Revolution are Kent and Story, noted in the preceding chapter.

3. The expansion of the original idea of freedom of speech and of the press into the nineteenth-century idea of liberty of public discussion is clearly reflected in Chapter xii of Cooley's *Treatise on the Constitutional Limitations,* also noted in the preceding chapter.

4. The best account of the constitutional controversies, which arose during the Civil War, is contained in W. A. Dunning's *Essays on the Civil War and Reconstruction* (1898). See also J. F. Rhodes's *History of the United States,* Vols. 3-5 (1899-1906).

5. Z. Chafee's *Freedom of Speech* (1920), not only discusses the law of the subject, as developed during the Great War, but also warmly defends the traditional American policy with regard to the public discussion of public affairs.

CHAPTER X

THE GENERAL WELFARE

1

THERE remains to be considered only one of the purposes which the people of the modern commonwealth are united in seeking to accomplish. This, according to the Preamble to the Constitution of the United States, is to promote the general welfare. The general welfare, however, like the other ends which the modern commonwealth is designed to serve, is difficult to define.

The religious functions of the state

In former times the most important function of the state, which would properly have fallen under the head of promoting the general welfare, was the care of religion. This function was clearly expressed in several of the declarations of rights which were adopted by the original States at the time of the American Revolution. It was strongly emphasized in the declaration of rights which formed part of the Massachusetts Constitution of 1780, the latest and most deliberately prepared of the original State constitutions. The subject of religion is first treated in the second article of that declaration, immediately following that in which all men were declared to have been born "free and equal," and to possess "certain natural, essential, and unalienable rights." "It is the right as well as the duty of all men in society," the article declares, "publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the Universe." And it concludes by laying down the principles of freedom of conscience and of worship. No person should be restrained from worshiping God in the manner "most

Religious liberty in the Revolutionary declarations of rights

agreeable to the dictates of his conscience," provided he did not disturb the public peace or interfere with others in their religious worship. These liberties thus became a part of the general juristic liberty of citizens of Massachusetts. In all the original States the ideas of religious and political liberty became more closely associated than they had ever been in England.

The public support of religion

But the Massachusetts declaration did not stop there. The third article proceeds to declare furthermore that "as the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore . . ., the people of this commonwealth have a right to . . . make suitable provision . . . for the institution of the public worship of God. . . ." This article concluded by asserting the right of the people to make provision also for religious education, and to "enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid . . ., if there be any on whose instructions they can conscientiously and conveniently attend." This was a moderate statement of the religious function of the state, as formerly understood.

Effect of separation of church and state on the religious activities of the modern commonwealth

But people's opinions concerning the relations between church and state changed. In the United States the predominant opinion no longer deems it either necessary or proper that the state should undertake to care for the religious interests of the people beyond protecting the adherents of each religion from undue interference by adherents of others. What constitutes undue interference —where, for example, the line should be drawn between tolerable propaganda by adherents of one sect among the members of another and that which is intolerable—is a

problem of domestic tranquillity. It has to be dealt with, like other phases of the liberty of public discussion, under the police power. The welfare power of the state has been in effect curtailed by the separation of state and church. In Massachusetts, the last of the States to give up a state church, the third article of the original declaration of rights was repealed in 1833 and the commonwealth discontinued the public support of religious worship and religious education. But the second article remains to the present day, a noble memorial of the importance which good citizens may still be supposed to attach to the practice of their religion. The predominant opinion in all states where the distinction between church and state is clearly recognized now obliges governments to refrain from systematic efforts to promote the general welfare by directly participating in the maintenance of religion. But even in these states, as has been pointed out,[1] religious observances have generally been preserved in the conduct of public affairs, and in many other states the care of religion continues to be an important public enterprise. In the modern commonwealth, however, such arguments as those set forth in John Locke's *Letters Concerning Toleration* tend to exclude the promotion of the strictly spiritual interests of men from the field of governmental action.

2

The educational functions of the state

In modern commonwealths the foremost function, which clearly falls within the scope of the welfare power, is the care of education. The educational function of the state, like the religious, has been the subject of much controversy, but, as the emphasis upon the latter has declined, that on the former has risen. Some of the reasons for this are closely connected with the nature of the modern commonwealth.

[1] See *ante*, p. 117.

Effect of the sentiment of nationality on the educational activities of the modern commonwealth

One cause of the growth of opinion in modern times favorable to the support and control of education by the state has been the rise of the sentiment of nationality. Nationalism became a powerful political force partly because education had become more popular and at the same time more liberal in character. Many writers have pointed out the similarity between the modern national state, especially the *Kulturstaat,* and the ancient Greek Commonwealth. As one writer has put it, the national state is the city-state, "writ large." Few statesmen have better appreciated the importance of a public system of education than those of the Greek city-states, and never have political scientists laid more stress on educational policies than the Greek thinkers of classical antiquity. Lycurgus is equally renowned for the form of government which he established in ancient Sparta and for the Spartan system of education. Plato was more interested in the education of the Guardians of his ideal Republic than in the organization of the public offices and the distribution of powers. The system of education, he believed, was the essence of the constitution. Aristotle prefaces his discussion of education in the *Politics* with an argument for public control which is still the best vindication of the educational policy of modern national states.[1]

Democracy and education

A more important cause of the growth of modern opinion favorable to state education has probably been the progress of democracy. The adaptation of education to the form of government contributes greatly to the permanence of the constitution and to the stability of the state itself. The ancient Greek political scientists understood this clearly. "The best laws," Aristotle wrote, "though sanctioned by every citizen of the state, will be of no avail unless the young are trained by habit and education in the spirit of the constitution."[2] And he went on to say that

[1] *Politics,* book VIII, chapter 1.
[2] *Ibid.,* book V, chapter 9, § 12.

in democratic states the education must be democratic, in oligarchical states, oligarchical, in character. "For there may be want of self-discipline in states as well as in individuals. Now, to have been educated in the spirit of the constitution is not to perform the actions in which oligarchs or democrats delight, but those by which the existence of an oligarchy or of a democracy is made possible. Whereas among ourselves," he added, "the sons of the ruling class in an oligarchy live in luxury, but the sons of the poor are hardened by exercise and toil, and hence they are both more inclined and better able to make a revolution." In the modern world the importance of a democratic system of education for the preservation of democracy has been recognized in democratic states. Popular education, even if originally instituted under religious influences or in response to nationalistic impulses, has been carried on in the service of democracy.

Influence of the idealistic theory of the state

A third cause of the more favorable opinion in modern times toward state education has been the greater influence of the idealistic theory of the state. This theory has tended to raise the dignity of the modern state, as compared with the feudal and territorial states which preceded it, and to broaden the prevailing ideas concerning the activities which states might properly undertake in order to promote the general welfare. This effect has been particularly manifest in the field of education. Rousseau, whose writings on education profoundly influenced the development of modern educational ideals and policies, was a strong advocate of state education. When Robespierre and other French Revolutionists who were of Rousseau's way of thinking came into power, one of their most cherished projects was a national system of education. Rousseau's ideas, indeed, went further, extending to a state religion as well as a system of state education, but the revolutionary Convention's experiments with

state education and a state religion were failures. The separation of church and state in more recent times has facilitated the further separation of religious from cultural and civic education. State training for citizenship, as well as for the pursuit of gainful callings, has been divested of its religious character, but has been impressed all the more with its appropriate political character. Training for citizenship in the modern commonwealth means explaining the nature of the purposes which are its foundations and emphasizing their importance. The best security that such training will be effective is to put it into the hands of teachers selected by the state itself and genuinely devoted to the principles upon which it stands.

The educational policies of realistic political theorists

The realistic political philosophers have inclined toward a different view of the function of the state in the matter of education. In the English-speaking countries, where the various types of Utilitarians have been the most influential of the realists, the prevailing opinion among them was formerly unfavorable to a policy of state education.

The opinion of J. S. Mill

John Stuart Mill, in general a stout advocate of a policy of *laissez faire,* was greatly disturbed by the indifference to popular education which he discovered among the Englishmen of his time. "Consider," he wrote in his magistral *Essay on Liberty,* "the case of education. Is it not almost a self-evident axiom that the state should require and compel the education, up to a certain standard, of every human being who is born its citizen? . . . Hardly anyone indeed will deny that it is one of the most sacred duties of the parents, after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life toward others and toward himself. But while this is unanimously declared to be the father's duty, scarcely anybody, in this country, will bear to hear of obliging him to perform it. . . . It still remains unrecognized, that to bring a child into existence

His advocacy of compulsory education at private expense

without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfill this obligation, the state ought to see it fulfilled, at the charge, as far as possible, of the parent."[1] Thus Mill warmly vindicates the right of the child to an education, though it is less clear to his reader than it was to himself how he derived this right from his particular version of the greatest-happiness principle.

Mill's opposition to state education

But even Mill was opposed to the education of the people in public schools under the management of the state. "A general state education," he wrote, "is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a depotism over the mind, leading by natural tendency to one over the body. An education established and controlled by the state should only exist, if it exist at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence." Mill believed that the true policy was for the state to require that every child receive a good education, but to leave the parents "free" to obtain the education where and how they pleased. The state might help to pay the expense of the poorer classes of children, but should not enforce its standards of education except by public examinations, "confined to facts and positive science exclusively." "The examinations on religion, politics, or other disputed topics, should not turn on the truth or falsehood of opinions, but on the matter of fact

[1] J. S. Mill, *Essay on Liberty,* chapter 5.

that such and such an opinion is held, on such grounds, by such authors, or schools, or churches." Thus Mill hoped to reconcile the "liberty" of each individual in matters of opinion and conscience with the promotion of the greatest happiness of the greatest number. He would maintain a minimum standard of knowledge among the people, but not "interfere" in matters of opinion.

The opinion of Herbert Spencer

This piece of "empirical utilitarianism" was particularly distasteful to the later "rational" Utilitarians. Herbert Spencer more consistently held the opinion that all parents should do as they pleased about the education of their children. Upon his principles, if children who grew up in ignorance were handicapped in the struggle for existence, so much the better. Presumably they were the children of stupid or lazy parents and they also were likely to be stupid and lazy. The less they were educated, the sooner they would make way for the more energetic and intelligent who were better fitted for survival and hence better entitled to survive. But such opinions proved out of harmony with the current of thought in modern states.

State educational systems on the continent of Europe

The advance of popular education under state control has been one of the most striking developments in modern states. In France, Germany, Switzerland, the Scandinavian and North Sea states, and to a lesser extent elsewhere on the continent of Europe, the education of the masses of the people is now carried on not only under state control,

Educational policy in France

but also to a great degree at public expense. In France, for example, the indifference among the governing classes concerning the education of the common people, which characterized the *ancien régime,* gave way at the Revolution to a burst of enthusiasm among the new rulers of the state for universal education under public control. The principle was established, but little was actually accomplished under the First Republic. Under the Empire of

the First Napoleon education remained a state monopoly, but lost its popular character. After the Restoration the Bourbons pursued a similar policy, until at the Revolution of 1830 an article was written into the revised Constitutional Charter guaranteeing the liberty of private instruction. But nothing was done to fulfill this pledge except the passage of an act in 1833, providing for a system of licensing private elementary school teachers. Under the Second Republic the liberty of private instruction was further guaranteed, and in 1850 was established by law for primary and secondary schools. The effect was to facilitate the establishment of church schools, and as inadequate provision was made for state schools at public expense, both under the Second Republic and under the Second Empire, the French educational system acquired a markedly clerical character. This worked especially to the advantage of the Roman Catholic Church, which alone was strong enough to organize an extensive system of schools. Under the Third Republic the issue between church and state schools was sharply drawn. The state made more liberal provision for the support of public schools than ever before, and reduced the influence of the clergy in the management of the schools. By the law of 1882 it made attendance at some kind of elementary school compulsory for all children between six and thirteen. Subsequent legislation, especially the laws of 1901 and 1904, greatly restricted the rights of the church in the management of the church schools, and the final separation of church and state in 1905 completed the secularization of the control of public education.

Educational policy in Great Britain

In the Protestant states of Europe the educational function of government has been recognized, but on account of the different relations between church and state the development of the systems of public education has taken a somewhat different form. As in France, however,

the policy of popular education under public control has generally been broad enough to include the higher education, cultural as well as professional and technical, in the state school system. In England, not only the utilitarian philosophy but also, and to a much greater degree, the rivalry of religious sects and the selfishness of the governing classes retarded the development of popular education under public control. During Gladstone's first ministry the Liberals began the modern policy of state aid and state supervision, but it was not until the Great War that England committed herself whole-heartedly to a national democratic educational policy. The Education Act of 1918 established the principle of free compulsory elementary education, and regulated the employment of children in industry so as not to interfere with the process of education. It also recognized the right of the religious sects to provide for the religious education of children in the public schools and to maintain church schools in accordance with the standards prescribed by law. It has been characterized as the first English educational measure whose primary object was the education of the children and not the settlement of religious differences and sectarian disputes.

Educational policy in the United States

In the United States a more fortunate situation has made possible a sounder policy than that which long prevailed abroad. Public education under state control began with the Puritans. Though their state was a church-state, their policy laid the foundation for the modern policy of compulsory elementary education and of free public schools for all who wish to attend them. At the same time, the liberty of instruction has been maintained and private schools may be operated alongside of the public schools by such businessmen and churches as wish to establish them. In 1922 a measure was adopted by the people of Oregon, requiring all children to attend the public schools,

but even this attempt to take civic education entirely out of the hands of private individuals and of the clergy did not contemplate any interference with the liberty of religious education or any other special training in addition to that provided in the public schools. Such measures involve the danger, however, of undue interference with the right of parents to care for those interests of their children which are not properly civic in nature. They may easily become the means of expressing religious intolerance or other forms of discrimination not consistent with the character of a commonwealth.

Danger of intolerance in a nationalistic educational policy

Another danger in the development of a national democratic educational policy is that the opinions of teachers will be subjected to undue restraint. This was one of the dangers which caused Mill to distrust the modern policy of state control of education. There has been some ground for this distrust in recent years. In New York State the so-called Lusk bills, proposed in 1920, were designed to set up a licensing system for the control of private schools, in order to prevent communist and other revolutionary propaganda in such schools, and to provide for the censorship of the opinions of public school teachers, in order to prevent such propaganda by them in the public schools or elsewhere. The danger in such legislation was widely recognized and the bills themselves, though passed by the legislature, were vetoed by the governor. It may well be doubted whether such measures would not weaken rather than strengthen the authority of any government which might adopt them.

Results of the educational activities of modern states

The educational activities of modern states in general have undoubtedly strengthened the authority of their governments and enhanced the stability of the states themselves. Unfortunately, on the continent of Europe, too much of the energy that should have gone into cultural and vocational training has been diverted into the training of

armies. Compulsory military service, to say nothing of war itself, has drained the resources which might have richly sustained the other branches of the training for citizenship. State education has glorified the triumphs of war and made too little of the victories of peace. True, the people of the modern commonwealth must not underrate the importance of the power of the state. They must not forget that they constitute a state partly in order that they may provide for the common defense and ensure domestic tranquillity. But they must also not fail to appreciate the importance of the other qualities which give their state its character. They must ever bear in mind their purposes to promote the general welfare, to secure the blessings of liberty, and above all to establish justice.

The charitable activities of modern states and the policy of social insurance

The extension of the welfare function of modern states to include the organization of public education has been accompanied by a similar extension of its activity in the organization of charity. The policy of those who have advocated the energetic development of the caritative function of the state has culminated in the modern program of social insurance. The state, they propose, should assume all the ordinary predictable risks of life in modern society, such as those of industrial accident, sickness, untimely death, permanent disability, involuntary unemployment, and dependent old age, and organize the community for the purpose of sharing these risks most equitably. So-called paternalistic governments, notably that of Germany, began the execution of such a policy a generation ago. The British Labor Party has proposed its complete adoption. This program, and indeed the whole process of extending the caritative function of the state, has produced conflicts of interest no less difficult to adjust than those which arose out of the educational policy of modern states. Similar arguments have been used in justification of support for,

or opposition to, these policies. But the arguments that have been most confidently relied upon by the advocates and opponents of social insurance have related more particularly to the economic, rather than the educational or cultural, functions of the state.

3

The economic functions of the state

The differences of opinion that have existed in modern times with respect to the economic functions of the state, especially with respect to the relations between government and industry, have been very great. We may disregard the Utopian socialists and communists, who would have no business except politics, and also the philosophical anarchists, who hold that there should be no government at all. Within these limits, however, opinion has varied from that of the ultra-individualists, like Herbert Spencer, who would have restricted the economic functions of governments within the narrowest possible limits, and the ultra-collectivists, like Marx and Lenin, who thought that all capitalistic enterprise could be transformed into an affair of state. No precise classification of these various opinions is practicable. It is enough, perhaps, to say that, by and large, there are two competing theories concerning the economic functions of the state, which have challenged attention in recent times, the individualistic and the collectivistic.

Individualism versus collectivism

The former expresses the point of view of those who wish to restrain the activity of governments within comparatively narrow limits; the latter, that of those who desire to extend governmental operations throughout comparatively broad areas of productive activity. The former distrust the value of governmental action, and believe that the true function of government is to keep the peace and enforce private agreements, and otherwise leave the world's work in the main to unfettered and unfostered

private enterprise. The latter put more faith in the assertion of social control over the individual, and believe that the state should undertake to promote the general welfare by all promising means. The former tend to regard government as at best a necessary evil; the latter, as an active instrument of good. According to the former, *laissez faire* is the cardinal rule of statecraft; according to the latter, the best state is what the Germans call an *Unternehmerstaat,* an energetic and enterprising commonwealth.

Utilitarian individualism

Among the individualists, J. S. Mill and Herbert Spencer are the writers who have exerted the greatest influence upon the development of opinion in recent times in English-speaking countries. Mill's views concerning the proper economic functions of the state are set forth in a series of able writings, above all in his *Principles of Political Economy,*[1] published in 1848, and in his *Essay on Liberty*. He distinguishes between two sorts of what he calls government "interference." The first is that which involves a direct infringement of "liberty," and is the necessary result, he thought, of the exercise of the police and war powers. There can be no coercion of any kind for any purpose, he believed, without a loss of "liberty." His objections to this kind of government "interference," as well as those of Herbert Spencer, have already been considered in connection with the discussion of liberty and of the police power. The second is that which arises when the government undertakes an enterprise of its own, such as a system of education or water supply, and involves an indirect abridgment of the "liberty" of private individuals to do the same thing. All government ownership and operation of public utilities of any

The opinion of J. S. Mill

[1] See Book v, "On the Influence of Government," and especially chapter xi, "Of the Grounds and Limits of the *Laissez Faire* or Non-Interference Principle."

kind, therefore, was deemed by the utilitarian individualists a sort of indirect government "interference."

The objections to indirect government "interference"

Mill enumerates in his *Essay on Liberty* three general objections to indirect government interference. The first is that ordinarily the thing is likely to be better done by individuals than by the government. "Speaking generally," Mill writes, "there is no one so fit to conduct any business, or to determine how or by whom it shall be conducted, as those who are personally interested in it." This principle, he thought, would condemn all governmental interferences with the ordinary processes of industry. The second objection is that "in many cases, though individuals may not do the particular thing so well, on the average, as the officers of government, it is nevertheless desirable that it should be done by them rather than by the government, as a means to their own mental education." Mill feared the sapping of individual initiative and self-reliance by a habit of dependence upon the government for action in any matter which individuals could dispose of by themselves. The third and most cogent reason for restricting the interference of government, he wrote, "is the great evil of adding unnecessarily to its power."

Mill's dread of bureaucracy

Mill was at great pains to show the evil resulting from the increase of the power of the government. He pointed out how every function added to those already exercised by a government increases its influence over men of ambition and talent. The growth of governmental activity is inevitably accompanied, he believed, by a corresponding growth of political patronage, until the point is reached at which either the desire to control such a volume of patronage demoralizes all parties and disturbs the tranquillity of the state, or a powerful bureaucracy develops which escapes control and dominates the state. If such a bureaucracy were inefficient, as well it might be, if it became the prey of contending factions within the govern-

ment, the mismanagement of public affairs would become a great evil. But an efficient bureaucracy, Mill believed, would be a greater evil. To such a bureaucracy "the rest of the community would look for all things: the multitude for direction and dictation in all they had to do; the able and aspiring for personal advancement. To be admitted into the ranks of this bureaucracy, and when admitted, to rise therein, would be the sole objects of ambition." Under such a régime no reform could be effected which would be contrary to the interest of the bureaucracy. The right of the masses to do as they pleased would be sacrificed for the sake of the efficiency of the public services. In the long run, Mill feared, the absorption of all the principal ability of the country into the governing body would prove fatal to the mental alertness of the people and to the progressive development of the state. He believed, moreover, that the bureaucracy itself would probably deteriorate, once it attained such a dominant position as to be beyond control. Thus in the end that efficiency itself would be lost, for the sake of which the "liberty" of the people had already been sacrificed.

The limits of governmental activity

Mill was not blind to the advantages of collective action for the promotion of the general welfare. He was aware, too, that the government may often be the most eligible agency for such collective action. But he dreaded an excessive reliance upon official authority to accomplish results which private individuals were capable of accomplishing for themselves. To determine the point at which the evils of governmental action begin to outweigh its benefits, he conceded, is one of the most difficult and complicated questions in the art of government. "It is, in a great measure, a question of detail, in which many and various considerations must be kept in view, and no absolute rule can be laid down. But I believe that the practical principle in which safety resides, the ideal to be kept in view, the

standard by which to test all arrangements intended for overcoming the difficulty, may be conveyed in these words: the greatest dissemination of power consistent with efficiency; but the greatest possible centralization of information, and diffusion of it from the center." Mill, therefore, would have advocated government support for and conduct of scientific investigations of all kinds, both in the natural and social sciences, and the most active efforts to publish as widely as possible the results of scientific inquiry. But he would leave the applications of knowledge to individual initiative and resources. "A government," he wrote, "cannot have too much of the kind of activity which does not impede, but aids and stimulates, individual exertion and development. The mischief begins when, instead of calling forth the powers and activities of individuals and bodies, it substitutes its own activity for theirs; when, instead of informing, advising, and upon occasion, denouncing, it makes them work in fetters, or bids them stand aside and does their work for them."

The significance of Mill's version of utilitarian individualism

Mill's theory of the functions of government, like his doctrine of liberty, possesses the great merit of emphasizing the dignity of the individual. He recognized that in the long run a state cannot amount to more than the worth of its members, and that a government which serves the people at the expense of their capacity to serve themselves is serving them badly indeed. The wealth of states consists ultimately of the energy and enterprise and wisdom of the individuals who compose them, and no degree of bureaucratic efficiency can compensate for the impairment of those qualities in the people. But in his theory of the functions of government, as also in his doctrine of liberty, Mill failed to lay down any clear rule by which one may know precisely what public services the state should undertake. As he frankly avowed, various considerations must be kept in mind and no absolute rule can be prescribed.

The doctrine of the natural harmony of economic interests

The preference of the empirical Utilitarians for an individualistic theory of the functions of government was based in part on their conviction that there is a natural tendency toward harmony between the economic interests of the individual and those of the state to which he belongs. This conviction was strikingly expressed by that clear thinker and exact writer, Adam Smith, the first and greatest of the British economists whose influence contributed to establish the policy of *laissez faire* in that country. Discussing in his epoch-making work, *The Wealth of Nations,* published in 1776, the expediency of protective tariffs and other restraints upon the importation from foreign countries of such goods as can be produced at home, he declared flatly that every individual necessarily labors to render the total income of the community as great as he can.[1] "It is only for the sake of profit," he wrote, "that any man employs a capital in the support of industry; and he will always, therefore, endeavor to employ it in the support of that industry of which the produce is likely to be of the greatest value." Generally, indeed, he neither intends to promote the public interest, nor knows how much he is promoting it. Nevertheless, Smith was assured, that is the inevitable result of supporting the industries which yield the greatest returns. "By directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affect to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it."

[1] *The Wealth of Nations,* Book IV, chapter 3.

The justification of free competition and the system of laissez faire

The utilitarian economists made this theory of the harmony of economic interests the justification of their system of political economy. According to the theory, the best security for the production of those commodities which the community wants, and the best safeguard against the production of those which it does not want, is to leave businessmen free to engage in whatever kind of business they choose. Since the test of a want that ought to be satisfied is the willingness of the consumer to defray the cost of satisfying it, the desire of businessmen for a profit is a sufficient incentive to induce them to direct the production of those commodities which are most wanted. By permitting businessmen to compete freely with one another, the amount of profit may be reduced to a minimum, and the community will thus be supplied with the goods it desires most at the lowest possible prices. The prosperity of a community that is organized in accordance with this theory depends, therefore, on the correctness of the prediction of the community's wants by businessmen, on their ability promptly and accurately to direct the productive forces of the community out of those channels where they are not needed and into those where they are needed, and on free competition between them. Free competition, therefore, should produce the greatest good for the greatest number, even though it may result in huge profits for the few, who are most successful in the struggle for profit, and losses for those who fail.

The problem of monopoly

There are, however, certain businesses to which the theory of the harmony of economic interests does not apply. Either they are of such a nature that, although useful to the public, private enterprise does not find it profitable to engage in them, or, though profitable, they are carried on under such conditions that free competition is impracticable. For example, the business of fire and marine insurance is one in which private enterprise readily

engages; but fire insurance companies have never supplied adequate facilities nor recruited and equipped sufficient numbers of men for extinguishing fires, nor have marine insurance companies built lighthouses or maintained life-saving stations and other necessary aids to safe navigation. In such cases governments have been compelled by humanitarian, if not economic, considerations, to fill the void which private enterprise has left. Again, the business of supplying water to a great city, or telephone service to a community of any kind, may be profitable enough; but ordinarily there is only one best source of water supply and competition is therefore impracticable, and competition in the telephone industry, though mechanically practicable, inevitably means either the impairment of the service by the division of telephone users among separate systems of communication, or the multiplication of facilities for rendering an identical service. In the former case the users do not get the service they want; in the latter, they pay too much for what they get. Governments are not compelled to engage in such businesses in order to fill a void, but they cannot overlook the fact that the theory of the harmony of economic interests does not apply where the lack of competition leaves the public without protection against a monopoly. Where a private monopoly exists, the monopolist's desire for the greatest possible profits furnishes an incentive for economical and efficient management, though the incentive may not be as great as under the conditions of free competition. But the monopolist's desire for profit affords the community no security that it will receive a fair share in the advantages of good management. The alternatives to private monopoly are some kind of public control through the exercise of the police power, or public ownership.

The Utilitarians recognized the limitation upon their policy of *laissez faire,* which results from the existence of

The problem of public ownership

monopolies, but in general they opposed the alternative of public ownership. They offered two kinds of objections to the public ownership and management of business monopolies. First, there were the political objections which have already been mentioned. Secondly, there were the purely economic objections, resulting from the difficulty of securing efficient management. The particular individuals who direct a business, which is owned by the government and operated on public account, are primarily interested in their own compensation. This must always be greater than their personal interest as members of the community in the products of the business in which they are employed. Since they do not themselves control the product of their labor, they cannot have the same incentive to increase the output or improve the quality of the service which men have who produce for their own private profit and not merely for public use. The real owners of the business, the people of the community, cannot themselves direct its daily management. They can only delegate their right of management to particular members of the community. Those who are to benefit most by the good management of a public business, that is, those who are at once its owners and its patrons, must utilize their collective interest to offset the lack of pecuniary self-interest on the part of the public business managers. True, the desire for the high esteem in which a faithful public servant may be held by the people whom he serves, and the consciousness of a public duty well performed, will stimulate the nobler sort of men to greater efforts in the public service than they would make for a mere pecuniary reward. But this, the Utilitarians believed, is an uncertain foundation on which to build up the personnel of a great business enterprise. Hence, the problem of public ownership resolves itself into a problem of organization and management.

Individualistic objections to public ownership and management

Individualists, whether Utilitarians or not, have doubted the possibility of organizing the businesses which the government undertakes so as to protect sufficiently the public interest in an efficient service at reasonable prices. The result, they have feared, would be at best a management characterized by hopeless mediocrity, and at worst by ruinous incompetence or shameless corruption. That this in fact is the ordinary character of governmental management of business enterprises has been boldly asserted by not a few writers of this way of thinking.[1] The attitude of such individualists is revealed by the remark attributed to one of their most influential leaders, Herbert Spencer: "Why should we hope so much from state agency in new fields, when in the old fields it has bungled so miserably?" According to these writers, private agency is always to be chosen for the conduct of business enterprises, including those of a monopolistic nature, wherever it is available, in preference to that of the government, on the ground, stated baldly, that it is the lesser of the two evils.

The problem of technical improvements

There is another objection to government ownership and operation of public utilities which is often raised by those who hold an individualistic theory of the economic functions of the state. A collectivistic policy, they assert, hinders industrial progress because it offers no adequate stimulus for technical improvements and inventions. Thus a modern French opponent of that policy, Paul Leroy-Beaulieu, after alluding to the work of the great inventors and men of science of the nineteenth century, observes: "The state, on the contrary, invents nothing."[2] This is, of course, true. It is equally true that private business corporations invent nothing. Inventions are the inexplicable products of human ingenuity. If there were no

[1] See, for example, Paul Leroy-Beaulieu, *L'état moderne et ses fonctions*, 3rd edition, 1900. Introduction, pp. 6-7.

[2] *Op. cit.*, p. 49.

opportunity for the remunerative exploitation of inventions, and consequently no incentive to appeal to the self-interest of inventors, it is probable that inventions would nevertheless continue to be made. Perhaps not so many men of an inventive turn of mind would sacrifice their health in the pursuit of fortune, but few would deny themselves the pleasure of exercising their inventive faculties. The maintenance of a supply of inventions would be ensured not only by the self-esteem of the individual, but also by the nature of the inventive faculty itself. The important matter from the point of view of the public interest is to ensure the utilization of the valuable inventions. Under the régime of private enterprise, this is provided for automatically by the play of free competition. Under a régime of monopoly, whether private or public, this empirical test of the utility of inventions is unavailable. There is no alternative but to substitute for the principle of competition that of organization. Men of inventive talent must be set apart for that kind of work and equipped with the necessary materials and supplies.

The problem of personal efficiency

Leroy-Beaulieu's fallacious argument that governmental enterprise must be unprogressive, because the state never invents anything, illustrates a defect in the whole individualistic theory of the functions of the state. It is always men who do things, whether working as government or corporation officials, or on private and personal account. The government, like the state itself, is a body of people, and the individuals who compose it are no less human than the rest of the individuals in the state. If public servants are unfit to carry on business activities successfully, the explanation must lie in the system of organization which the government adopts for its business activities. Individualist writers have pointed out the principal defects of the various systems of organization which governments have adopted for the construction of public works and the

operation of public services. Many of these defects, of course, may also be found in the organization of private enterprises under similar conditions. For example, the lack of personal interest in the financial results of operations on the part of the officers and men employed in a government business enterprise, such as the postal service, is an obstacle to the greatest efficiency which no government has yet wholly overcome. But the same lack of personal interest in the financial results of operations is also evident among the men employed by large private corporations engaged in similar enterprises and may even be observed among the officers of such corporations, when their interest in the profits through their holdings of capital stock is insignificant in comparison with their interest in their wages of superintendence.

The opinion of Adam Smith

Adam Smith was so profoundly impressed with this and other obstacles to the attainment of high efficiency in businesses conducted by joint-stock companies that he saw little future for the business corporation as a form of industrial organization in ordinary competitive industry. "The only trades which it seems possible for a joint-stock company to carry on successfully, without an exclusive privilege," he wrote,[1] "are those of which all the operations are capable of being reduced to what is called a routine, or to such a uniformity of methods as admits of little or no variation." He proceeded to specify the kinds of business which he deemed suitable for business corporations to engage in without the grant of a legal monopoly. They were banking, insurance, the operation of canals, and the maintenance of systems of water supply. In all other businesses, he believed, the only form of organization that could carry on successfully in the face of free competition was that which consists of the individual businessman, managing his business himself, or at most in

[1] *The Wealth of Nations,* Book V, chapter I.

company with a few partners, but without any limitation of personal liability or other special privilege.

The improvement of corporate methods of business management

Since the time of Adam Smith the corporate system of business organization has been greatly improved. Businessmen have learned how to organize business activities on a large scale, combining large capital with large numbers of workers in a single enterprise, and competing sucessfully with individuals working on personal account and enjoying for themselves alone the full product of their labor. In the great business corporation of modern times, the divergent interests of masses of wage earners, having no financial interest in the product of their labor beyond their daily wages, of a multitude of investors, whose interest in the conduct of the business may be limited to the return of a stipulated rate on their capital, and of the operators and executives, whose compensation may also be fixed without regard to the actual profits of the enterprise, have been reconciled to a degree that Adam Smith could not have supposed possible. The executives of the great business enterprises of modern times have had to face the problems of management which persuaded Adam Smith that joint-stock companies could not carry on successfully in any but the simplest businesses. Their experiences in dealing with these problems have not only enabled them to make the corporate form of business organization much more efficient than the early individualists deemed possible, but have also taught statesmen how similar problems should be dealt with in the management of businesses operated by the government. Modern methods of recruiting, training, compensating, promoting, and retiring employees can be employed by government as well as by corporate business managers. Modern methods of purchasing supplies and equipment are as available for the former as for the latter. The same is true of modern methods of accounting and statistical control.

The organization of public enterprise during the World War

Governments may even utilize the forms as well as the methods of corporate organization. During the World War the governments of all the principal Powers engaged in business operations of many kinds on an unprecedented scale. The economic functions of government were enormously expanded. Collectivism became the order of the day. In the United States the Federal Government, compelled to improvise suitable organizations for the performance of its economic functions, adopted the ordinary corporate form for several of its emergency activities. The Shipping Board organized the Emergency Fleet Corporation to carry on its shipbuilding activities. The Department of Labor organized the Housing Corporation to execute its house-building program. The Food Administration organized the Grain Corporation and the Sugar Equalization Board, Incorporated, to control the grain trade and stabilize the trade in sugar. The Treasury Department organized the War Finance Corporation in order to finance the private enterprises which needed additional capital for war-time developments. The War Trade Board incorporated its Russian Bureau, in order to handle more efficiently its business operations in Russia and Siberia. The railroads and telegraphs and telephones, which were taken over during the war in order to establish a more effective unified control of operations and secure economies not possible under competitive conditions, were actually operated by the regular corporate officials under government direction. After the war the principal advocates of government ownership and operation of the railroads as a permanent peace-time policy proposed a modified form of corporate organization for the national railroad system.

It is not necessary to discuss here the various proposals which have been advanced in recent times for the organization of the public services. It is enough to say that govern-

ments not only can appropriate for themselves the lessons of the experience of private businessmen in the organization of industry, but also can adopt devices for adjusting the services rendered to the needs of the community, as the Germans and Swiss have demonstrated in the management of their railroads and other public utilities, that are hardly practicable for private business corporations.[1] It is evident that Adam Smith, if he were alive to-day, would not only have to modify his views with respect to the usefulness of the business corporation as a form of industrial organization, but would also probably change his mind to some extent concerning the economic functions of governments themselves. The individualism of the most enlightened thinkers of the eighteenth century manifestly does not fit the facts of the twentieth.

The improvement of governmental methods of business management

Indeed, the individualistic theory of the economic functions of government has been shaken to its foundations. There is no more convincing evidence of the change of opinion in this regard than the history of the doctrine of the harmony of economic interests. Adam Smith and the early nineteenth-century individualists set great store by the "invisible hand" which leads men, who with single-minded purpose are absorbed in the pursuit of their private interests, to promote the interests of society as a whole more effectually than when they really intend to promote them. John Stuart Mill, the most truly liberal-minded of the nineteenth-century individualists, attempted to establish his system of political economy on the basis of this doctrine of the natural harmony of economic interests. That he found this enterprise difficult is evident from his celebrated chapter on the future condition of the working classes in the *Principles of Political Economy*.[2] Eventually, as he candidly confessed in his "Autobiography," he gave

The decline of individualism

[1] See A. N. Holcombe, *Public Ownership of Telephones on the Continent of Europe*, chapters 3 and 24.

[2] *Principles of Political Economy*, Book IV, chapter 7.

up the endeavor and frankly avowed his conviction that a just distribution of wealth and income could not be secured without abandoning the assumption of a natural harmony of economic interests among all the productive members of a state. His loss of confidence in the utilitarian individualism foreshadowed the tendency of the coming age. Yet the old notion of an insuperable conflict between individual "liberty" and government "interference" still continues in the twentieth century to dominate the minds of many economists.[1]

4

The development of economic policy in Great Britain

The old Toryism

Professor Dicey, in his *Lectures on the Relations between Law and Opinion in England during the Nineteenth Century,* has traced the development of British opinion concerning the economic functions of the state. At the beginning of the century the dominant opinion was that which he describes as the Old Toryism. Its characteristic feature was legislation in the interest primarily of the land-owning and commercial classes which then controlled the government of the United Kingdom. There was little ownership and operation of business enterprises directly by the government, but a great deal of regulation of private industry and trade, partly by means of ordinary police regulations, partly also by the grant of bounties and exclusive privileges of various kinds, and partly by tax-exemptions and other special discriminations in taxation. Though these measures inured immediately and directly to the advantage of the special interests which were able to obtain them, they were justified by these "interests" on the ground that they would also increase the wealth of the state as a whole. Political economists watched the balance of foreign trade with a jealous

[1] See, for example, Professor F. S. Nicholson's discussion of the economic functions of government in the fifth book of his *Principles of Political Economy,* published in 1901.

eye, believing nothing a more favorable sign of the general welfare than the growth of a nation's stock of money. This was the policy which Adam Smith attacked in his famous treatise, *The Wealth of Nations,* in which the less obvious and more dubious effects of what he called the commercial or mercantile system were clearly exposed.

The old Liberalism

During the course of the century the Old Toryism gradually gave way to a new body of opinion concerning the economic functions of government which may now best be described as the old Liberalism or Individualism. The period of its predominance was characterized by the general adoption of measures more favorable to the interests of the manufacturing and industrial classes. Their advent to power was demonstrated most clearly by the reform of the House of Commons in 1832, of the ancient poor law in 1834, and of municipal government in 1835, and by the repeal of the corn laws in 1846. The latter measure definitely subordinated the interests of agriculture to those of the factory industries. It marked the passing of the old landed aristocracy and the complete triumph of modern capitalism. The navigation acts were revised. The old colonial policy, which favored those colonies that could supply the domestic consumer with commodities not produced at home, gave way to the new, which regarded colonies chiefly as markets for the domestic producer. The development of Great Britain as the workshop of the world, and of London as its financial center, was followed by an unprecedented growth of population and of total wealth. The English farmer trembled, but businessmen rejoiced to have found the *laissez-faire* or non-interference principle a justification for a policy which seemed at the same time to serve their special interests and to promote the general welfare.

In the latter part of the nineteenth century the law was

The new Collectivism

influenced more and more by that kind of opinion which Dicey terms Collectivism. Wage earners had discovered that often they were not on terms of economic equality with employers, and that an unqualified freedom of contract served their interests badly. They looked to the government, therefore, to establish more attractive conditions of employment than they could privately extort from reluctant employers. They hoped the government might do this to some extent by itself providing the employment through national and, more frequently, municipal ownership and operation of public utilities. To a much greater extent, they looked for protection to the exercise of the police power. They demanded factory acts, to protect the health and safety of workers in industry, and other restraints upon the freedom of contract to protect the consumers of factory-made goods. They relied on arbitration laws and minimum wage laws to regulate rates of wages. Employers' liability and workmen's compensation laws would secure them against the results of industrial accidents. Old-age pensions and other schemes of social insurance would equalize the burden of proletarian hazards. For similar reasons they demanded that the government establish labor exchanges, and promote vocational training. Such collectivistic measures, though advocated primarily in the interests of the wage earners, were justified by their advocates, like the individualistic measures of the preceding period, on the ground that they would promote the general welfare. Businessmen might argue that the substitution of public for private enterprise would bring about the growth of bureaucracy, with all the attendant evils against which Mill and the utilitarian individualists had warned them. Taxpayers might shudder at the prospect of governmental extravagance and inefficiency. But wage earners were encouraged by collectivistic writers, especially the Webbs and the other

Fabians, to believe that the problems of administration in a collectivistic state were not insoluble.

The political significance of theories of the economic functions of government

In 1867 the Representation of the People Act first gave the industrial wage earners a direct voice in the conduct of public affairs. The Parliament Act of 1911 and Representation of the People Act of 1918 overthrew the remaining constitutional barriers between the proletariat and the conquest of political power. At the election of 1922 came the rise of the Labor party toward ascendency in the state, with its projects for wresting economic power from the capitalistic classes by political methods. The collectivistic theory of the economic functions of government serves to reconcile the special interests of the proletariat with the promotion of the general welfare, much as the individualistic theory served a similar purpose in the period of capitalistic supremacy. It serves to justify the use of political power for partisan ends, much as the old Liberalism served the interests of modern capitalism, and the old Toryism the landed interest of former times.

The development of economic policy in the United States

In the United States the development of opinion with respect to the economic functions of government has never been studied with the same care as in Great Britain and, indeed, in Europe generally. There has always been a greater variety of economic conditions than in any one of the European states, and no single theory could so well vindicate all the various economic policies demanded in different sections of the country by the locally dominant classes of people. Americans are fond of repeating after one of their popular presidents that it is not theories, but conditions, that confront them. This, of course, is true of the problems of statesmen everywhere. A theory is nothing more than an explanation of a problem and a justification of the policy pursued in dealing with it. The phrase serves, however, to conceal the difficulty which Americans have always found in formulating a policy upon which

they could act consistently in dealing with the manifold problems which arise in the adjustment of the conflicting interests of so diversified a population.

With one conspicuous exception, the conflicts of interest between different sections of the American people have hitherto been adjusted by political methods and on the whole with extraordinary success. But this success has been achieved in spite of much confusion of thought and great inconsistency in practice. To be sure, the American people, because of the English origin of their political institutions and of their common law, and because of their continued use of the English language, have always been more or less influenced by English thought. In the main, however, statesmanship has been highly opportunistic and empirical policies have prevailed. Rational theories concerning the economic functions of government have been little needed by a people largely occupied in the subjection of a wilderness, where individual initiative and private enterprise have generally been much more important than governmental activities and social control.

State paternalism in the original States

In the early years of the Republic the same economic policy tended to prevail on both sides of the Atlantic. The old Toryism of Great Britain, particularly those aspects of it termed by Adam Smith the mercantile system, survived in America in the less offensive but, from the national standpoint, even more injurious form of State paternalism. An examination of the legislation of the leading States, enacted during the period between the Declaration of Independence and the adoption of the Federal Constitution, indicates that the imposition of restraints upon the conduct of industry and trade was a common practice. Massachusetts, for example, prohibited the importation of loaf sugar in order to encourage the domestic sugar refining industry; prohibited the exportation of green or manufactured calfskins, in order to

encourage the domestic tanning and boot-and-shoe industries; prohibited the cutting of white pine without special license, in order to conserve the forests; regulated the exportation of flaxseed, pot- and pearl-ash, beef, pork, and fish; and prohibited Massachusetts shipowners and mariners from engaging in the slave trade. The taking of interest in excess of six per cent per annum was made criminal usury. The State government itself took shares in various manufacturing enterprises, in order to encourage the establishment of infant industries, and lent the public credit to private capitalists for the same purpose. In Virginia during this period not only were laws enacted regulating the exportation of flour and bread, and of tar, pitch, and turpentine, but also the tobacco industry, the principal employment at that time, was supervised and controlled in all its branches with the most meticulous paternal care. Everywhere indirect restrictions were put upon industry and trade by protective duties on imports and the grant of bounties to domestic manufacturers. Grants of monopoly were not infrequent, and the resulting limitation of the right of individuals to engage in lawful enterprise was not considered a violation of the liberties of freemen.

The early influence of utilitarian individualism

The individualism of Adam Smith and his successors did not fail to impress the leaders of opinion in America. Both Jefferson and Hamilton especially commended Smith's *Wealth of Nations.* But the struggle to subdue the wilderness with insufficient resources in both capital and men impeded the general acceptance of a policy of *laissez faire,* notwithstanding the fact that the existence of the unsettled frontier was a standing invitation to individuals to become the sole architects of their own fortunes. Government aid was required not only for roads, but also for canals and other works of internal improvement. The success of the Erie Canal gave a great impetus to the

policy of government ownership and operation, and it was not until the failure of the more ambitious projects of internal improvement after the panic of 1837 that reliance upon public enterprise began to wane. The coming of the railroad ushered in an era of private enterprise on an unprecedented scale, but not without substantial assistance from a bountiful Federal government in the form of land grants and in some instances also bond guarantees. A similar policy was pursued by local governments which hoped to stimulate the development of transportation and manufactures. Tax exemptions for a period of years were a common practice, and bounties or the endorsement of bond issues were a not unusual, though less frequent, resort. *Laissez faire* was already a watchword among the English-governing classes, but except in connection with tariff controversies, it had hardly penetrated the minds of Americans. Economic theory never had the same interest for the people of the United States as political theory, and their political theory aimed chiefly to improve the methods by which the state may seek to gain its ends. It was not much concerned with the scope of governmental activity.

The conflict of theory and policy

After the Civil War competitive capitalism seemed to have become strong enough to stand upon its own feet without direct public aid, and the abuses of the public faith by unscrupulous or incompetent promoters tended to discredit the paternalistic system. People began to recall the adverse opinions expressed by such leaders as Jefferson, forgetting how contrary their actual policy often was to the theories they proclaimed. "A wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits. . . . This is the sum of good government." So Jefferson said in his First Inaugural. Then he proceeded to plunge into the greatest real estate speculation

of modern times, and presently devised a policy of internal improvements under government auspices so far-reaching that it has not yet been fully carried out. Tom Paine, not a profound thinker, but skillful in giving voice to the thoughts of the inarticulate masses, having commenced by declaring that "government even in its best state is a necessary evil," and that "the more perfect civilization is, the less occasion it has for government," suddenly thrust aside his theories and elaborated a program of social reform which, after the passage of a century, his radical successors have just begun to carry into effect. He proposed, for example, old-age pensions, invalidity insurance, maternity benefits, aid to mothers with dependent children, and the decasualization of casual labor. Thus he not only sketched the task of the twentieth-century collectivists, but he exploded his own premises.[1] But by the latter part of the nineteenth century conditions had changed and the theories began to assume a greater importance.

The later influence of utilitarian individualism

At first it was the individualistic theory of the economic functions of government that seemed to gain ground. This was less evident, however, in the enactments of legislative bodies than in the decisions of the courts. An inclination toward the non-interference or *laissez faire* principle was first manifested in the decision of certain cases which arose shortly after the Civil War under the tax power. The power to tax is one which may be used to accomplish various public purposes. According to the Federal Constitution, the power was granted to the Congress in order to pay the debts and provide for the common defense and general welfare of the United States. There has been much discussion concerning the extent of the power conferred upon the Congress by this provision, since the general welfare, or at least that of the dominant classes in the state, may be promoted indirectly in many

[1] See H. N. Brailsford, *Shelley, Godwin, and Their Circle,* p. 75.

ways through tax discriminations. The better opinion is that the Congress may not use the tax power in order to promote the general welfare in any manner it deems expedient, but only in such manner as is authorized, either expressly or by fair implication, elsewhere in the Constitution. The State governments have a broader discretion in the use of the tax power. From early times, as has been pointed out, the State governments had been in the practice of using the tax power to encourage particular industries, especially by granting bounties or other aid from the public treasury or by allowing special exemptions in the assessment of property for taxation. But now, in a number of cases, the State courts interposed and declared such measures to be unconstitutional. The argument that state paternalism was a justifiable mode of promoting the general welfare was brushed aside with the assertion that public money might not be devoted to a private use, nor should the tax power be employed to carry out private rather than public purposes.[1]

Individualism and the police power

The judicial preference for an individualistic theory of the economic functions of government has been most manifest in recent years in connection with cases arising under the police power. The police power, as has been pointed out, always involves the restraint of individual action in some manner, in order primarily to protect an interest of some class in the state. The classes which in modern times have most frequently sought special legislation to protect their interests have been the farmers and the industrial wage earners. The latter, on the whole, have been less successful than the former in convincing the courts that the protection of their special interests could be reconciled with the promotion of the general welfare. The uncer-

[1] See Allen *vs.* Jay, 60 Me. 124 (1872); Brewer Brick Co. *vs.* Brewer, 62 Me. 62 (1873); and Lowell *vs.* Boston 111 Mass. 454 (1873). See especially Loan Association *vs.* Topeka, 20 Wall. 655 (1873), which is discussed in the following chapter, p. 467.

tainty that has existed concerning the theory that would be applied in cases affecting the interests of the latter class is illustrated by the history of legislation regulating hours of labor and rates of wages in industrial employment. The Illinois Supreme Court, for example, denied the power of the legislature to limit the hours of labor of women employed in industry in a case decided in 1895, and decided that it had the power in 1910.[1] The New York Court of Appeals denied the power of the legislature to prohibit the employment of women in industry at night in 1907, and decided that it had the power in 1915.[2] The Federal Supreme Court has approved measures limiting the hours of labor in several cases, including one, the Adamson law case, in which the limitation was of such a character as to raise wages without necessarily affecting the hours of labor.[3] But in the Oregon minimum wage case it was unable to come to any decision concerning the fixing of minimum wages for women in industry, and the theory that will be applied in such cases remains undetermined.[4] A few years ago it seemed that the individualistic theory might be definitely read into the Constitution by the decisions of the courts in this class of cases. That result, however, no longer seems so probable.

The uncertain constitutionality of labor legislation

The lack of a settled theory concerning the economic functions of government in American politics is well illustrated by the controversy over free trade and protection. Adam Smith recognized only two cases in which protective tariffs on foreign goods seemed to him permanently expedient. One was that of commodities which are

The controversy over free trade and protection

[1] Ritchie *vs.* People, 155 Ill. 98; and Ritchie *vs.* Wayman, 244 Ill. 509.

[2] People *vs.* Williams, 189 N. Y. 131; and People *vs.* Schweinler Press, 214 N. Y. 395.

[3] Wilson *vs.* New, 243 U. S. 332 (1917).

[4] Stettler *vs.* O'Hara, 243 U. S. 629 (1917). In the District of Columbia minimum wage case, decided in April, 1923, the Supreme Court has after long delay adopted the view that such measures are unconstitutional. This case is discussed *supra,* p. 334.

essential to the national defense. He deemed it imprudent for a state to rely on foreign sources of supply, which might be shut off in time of war when such commodities were most needed. The second case was that of customs duties imposed upon imported goods, to compensate for internal revenue duties imposed on the same goods produced at home. He thought that high duties might also be approved as a temporary expedient in two other cases. The first was that in which domestic industry had become accustomed to high protective duties and a sudden and violent reduction would cause serious unemployment. In such a case he suggested that duties should be reduced gradually. The other case was that in which high duties might be imposed by way of retaliation. If a state's export trade were seriously injured by protective duties imposed by another state on imports, it might be profitable to retaliate by injuring the other state through similar discriminations against its export trade. Such retaliatory tariffs would in the first instance injure the state which imposed them as well as its rival, but if the rival was thereby forced to modify its own tariff system, the temporary injury to the retaliating state might be offset by the gain that would result in the long run.

Tariff arguments in American politics

In America the national-defense argument for protection was broadened to cover the case of any industry which might be useful in time of war, such as the iron and steel and textile and chemical industries. It was argued further that a country should, as far as possible, be independent of foreign markets as well as foreign sources of supply, and that the diversification of industry necessary for the development of a well-balanced home market could best be brought about by a judicious policy of protection. The argument for compensating duties was broadened to cover the case of additional costs of any kind which might fall upon the domestic producer in competition with the

foreigner. This argument was applied especially to the case of infant industries, which might be expected to grow up with suitable encouragement and arrive at an independent self-supporting maturity. It assumed its final form in the pleas for high duties in order to protect the American workman against the competition of the "pauper" labor of Europe.

Special interests and the general welfare

All these arguments were advanced by protectionists who professed to believe in each case that the policy of protection would promote the general welfare. Nevertheless, the policy of protection must be subject in many cases to the same objections that were brought, especially in the period following the Civil War, against the grant of bounties and special tax exemptions and the lending of the public credit for private business enterprises. In the case of the railroad land grants and other similar aids, that form of paternalism was not disapproved by the courts, but in other cases, as we have seen, it encountered judicial condemnation. It is not practicable under the judicial system of the United States to question the constitutionality of a protective tariff before the Supreme Court, but it is not surprising to find that in practice protective tariffs have been supported in the Congress chiefly by representatives from those sections in which the protected industries were located, and which stood to gain, therefore, immediately and directly by the imposition of protective duties.

Despite the many arguments designed to show that protection promotes the general welfare, the opponents of that policy have never failed to point out that it operates in the first instance to enhance the profits of the producers of protected commodities, and thus favors a privileged class at the expense of the rest of the community. They have often condemned the policy in the strongest terms. In 1892, for instance, the Democratic party, declaring

in its national platform its opposition to protection, denounced it as downright robbery of the many in the interest of a privileged few. The survival of this vestige of the mercantile system of the eighteenth century cannot be explained upon any clear principle in which the American people are agreed. Though it may have—indeed probably has—promoted the general welfare in certain respects, opinion has differed on this. But there can be no doubt about the consensus of opinion that it has served the special interests of those groups which have generally controlled the government of the United States, when the policy of protection has prevailed.

The recent progress of collectivism

In recent times the collectivistic theory of the economic functions of government seems to have gained ground. The economic changes, which have fostered collectivistic tendencies in British legislation in recent years, have taken place, though not to the same extent, in the United States. The growth of industry on a large scale and of the great cities which such industry produces has brought similar influences to bear upon opinion on both sides of the ocean. At first the demand for collectivistic measures grew more slowly in America than in England, but the war-time control of industry and commerce has familiarized all classes of people with the idea that, when deemed necessary and proper, the economic functions of government may be greatly expanded. At the same time it has revealed the difficulties in a policy of collectivism more clearly than any amount of theorizing could have done. Under what circumstances in times of peace a collectivistic policy would be deemed a suitable mode of promoting the general welfare, must remain uncertain. Dominant opinion in the United States, however, does not seem to reflect the point of view of the industrial classes to the same extent as in Great Britain. Here it is the farmer rather than the wage earner who is forcing the experiments with collectivism.

Collectivism and the farmers

The program of the Non-Partisan League

The most energetic use of the welfare power has taken place in the rural state of North Dakota. The legislative program of the Non-Partisan League included the establishment of a state bank, the lending of public money to private citizens for the building of homes, the construction at public expense of grain elevators and other shipping facilities, and the operation of a public warehouse system on behalf of the grain growers by the State government. Despite the protests of North Dakota taxpayers, who alleged that such a program meant the devoting of public property to private uses, the United States Supreme Court decided that, if the dominant opinion in North Dakota deemed these enterprises to be a means for promoting the general welfare, it ought not to interfere.[1] That the period of collectivism in America is as likely to be ushered in by the farmers as by the urban industrial wage earners is suggested also by recent experiments under the police power.

The compulsory arbitration of labor disputes

In the field of legislation under the police power the most collectivistic measure yet enacted is the Kansas industrial commission law, providing in effect for the compulsory arbitration of labor disputes. No measure has imposed more drastic restraints upon the right of the individual employer or employee to do as he pleases. But this law was procured by a combination of farmers and businessmen. The wage earners themselves opposed it.

[1] Green *vs.* Frazier, 253 U. S. 233 (1920). It is significant that the courts, in dealing with cases involving the validity of tax laws, have generally preferred to justify the prohibition against taxation for other than public purposes upon the doctrine set forth in the Topeka Iron-Works Case, *i. e.* upon the general principles of free government (see *infra* p. 467), rather than upon any such interpretation of the "due process of law" clauses as has been applied in cases arising under the police power. See H. L. McBain, "Taxation for a Public Purpose," 29 *Political Science Quarterly* 185. A more recent writer, however, thinks there is now a tendency to adopt the "due process" rule in tax-power, as well as in police-power, cases. See R. E. Cushman, "The Social and Economic Interpretation of the Fourteenth Amendment," 20 Michigan Law Review, 7 at p. 740.

Likewise, the proposals which have been advanced since the World War for the compulsory arbitration of labor disputes on the steam railroads have come from the railroad managers, and from the shippers, who suffer most from interruptions of service, both businessmen and farmers. The opinion among wage earners themselves is more divided. Possibly, if the urban proletariat in North Dakota and Kansas instead of the farmers dominated the State government, their opinion would be clearer.

Modern collectivism and social democracy

Be that as it may, the dominant ideas of the age of competitive capitalism in economics, and of individualistic liberalism in politics, have manifestly lost ground. The opinion that men, by seeking their private interests in their own way, best promote the general welfare is no longer so widely held or so confidently maintained as formerly. The belief has been generally abandoned that any relation between government and industry is objectionable "interference," which is more intimate than that resulting from the government's efforts to keep the peace and enforce contracts. Law and order begins to mean law and order in the economic community as well as in that which is most strictly political. The organized economic community, however, as Mr. Delisle Burns has pointed out in his instructive book *Government and Industry*,[1] is found to be neither the state alone, as many socialists have supposed it would be, nor the purely non-governmental organization of industry, as syndicalists and the so-called new guildsmen would have it, but an unprecedented combination of the two. The inadequacy under modern conditions of the individualistic system of production primarily for profit, instead of for use, and of distribution according to ability, without much regard for need, has been demonstrated by a crowd of writers. Mr. R. H. Tawney's recent book, *The Sickness of an Acquisitive Society*,[2] is an excellent

[1] C. D. Burns, *Government and Industry*, London, 1920.
[2] R. H. Tawney, *The Sickness of an Acquisitive Society*, London, 1920.

specimen of this type of criticism of capitalistic individualism. Among the modern collectivists Sidney and Beatrice Webb have been the most influential, and largely under their intellectual guidance British labor leaders and politicians have been working out the new theory of the economic functions of government. This has led to a new understanding of democracy itself, not only in Great Britain, but also in the United States.[1]

5

The nature of the welfare power

The most cursory survey of the history of opinion with respect to the functions of government in modern states shows the impossibility of defining the welfare power with precision. In a general way it may be said that the welfare power is the power to accomplish any public purpose, other than that of insuring domestic tranquillity and that of providing for the common defense, by any means except the restraining of personal conduct and the use of physical force and violence. It is the residual power of the modern state, embracing all the powers that remain after allowing for the police and war powers. It is broad enough to enable a government, unless limited by the law of the state itself, to do whatever may be demanded of it by the dominant opinion in the state. "Is the end of law," Dean Pound inquires toward the close of a significant discussion of that subject in his recent work on the philosophy of law,[2] "anything less than to do whatever may be achieved thereby to satisfy human desires?" Whether the state be

[1] This new understanding of democracy is explained by the Webbs in the Introduction to their significant book, *A Constitution for the Socialist Commonwealth of Great Britain,* published in London in 1920. In the United States certain of its aspects, under the name of the democratization of industry, have already aroused much attention. But this is a matter which touches the problem of government rather than the nature of the state itself.

[2] Roscoe Pound, *An Introduction to the Philosophy of Law,* New Haven, 1922, p. 96.

one which accomplishes the purposes of its members by due process of law or one possessing a government of men, unrestrained by any law other than that dictated by their own interests, the promotion of the general welfare is an enterprise whose character can be determined only by the opinion of the people themselves. In the ideal commonwealth public opinion would be the dominant opinion, and the welfare power could serve none except truly public purposes. But in actual commonwealths, as in the inferior kinds of states, what is a public purpose is itself a matter of opinion, and the kind of opinion that will prevail in particular cases will depend, partly upon the circumstances of the case, partly upon the form of government and the nature of the state itself. To promote the general welfare is to promote the welfare of the men and women who actually constitute the state. If in any particular case governmental action will promote equally the welfare of all the members of the state, there will not be much controversy concerning the action to be taken. But if, as must generally be the case, some of the members of the state seem likely to benefit at the expense of others, or even merely somewhat more than others, by a proposed use of the welfare power, the dominant interests in the state, whatever they may be, are in a position to interpret the public purpose in the light of their special purposes, and to serve their special interests under the guise of promoting the general welfare. In short, there are no limits to what a government may undertake to accomplish by means of the welfare power, except those fixed by the character of the purposes which the dominant opinion in the state recognizes as public purposes.

Private interests and the general welfare

Much confusion concerning the nature of the welfare power has arisen from the failure to distinguish between the power itself and the expediency of using it in particular cases. Whether or not it is expedient for a particular gov-

ernment to undertake a particular service depends upon the nature of the service to be rendered and of the government which is to render the service. Strong and efficient governments can wisely undertake many services which feeble and ineffective governments must leave to private enterprise or to that of churches and other non-political organizations. The nature of the service, moreover, must be compatible with that of the state itself. Ecclesiastical states may properly undertake the care of religion. Nationalistic states cannot avoid assuming responsibility for the management of education. Proletarian states will inevitably concern themselves with the distribution of wealth. Theories of the functions of government are meaningless, unless they are related to the conditions that determine the character of states. The relativity of function to structure is as true of the war and police powers as of the welfare power. The police power, like the welfare power, is certain to be used in proletarian states, for example, for purposes which would never be recognized as public purposes in states dominated by capitalistic interests. The definition of the power is a much less important matter in practical politics than the forms and processes of the government which is to administer the power. Political power, whatever be its nature, is the means by which the government of a state adjusts the conflicts of interest between its members. The kind of adjustments which will be made in any particular state depends, partly, to be sure, upon theories of governmental action which express adequately the underlying tendencies of the age, but largely upon the forms and processes of government. It is the forms and processes of government that partly determine, partly reveal, the nature of the interests which dominate the state. No adjustments can be thoroughly satisfactory that do not rest upon the authority of a government, which reflects in its operations all the sub-

stantial interests that may conflict with one another. Otherwise, private will prevail over public purposes, and the general welfare will be sacrificed in favor of that of special interests in the state.

Public interests and the problem of government

It is evident that the promotion of the general welfare is bound up together with the accomplishment of the other purposes of the people of a modern commonwealth. It is not possible to separate the purposes which give the commonwealth its character and pursue any of them without regard for the others. The people who form a commonwealth in order to promote their general welfare wish also to provide for the common defense and to insure domestic tranquillity, to establish justice, and to secure the blessings of liberty. They look to their government to balance their various public interests in such a manner as to secure each in due measure. This balancing of the public interests of the people of a commonwealth, together with the balancing also of the private interests of the various classes and groups and individuals within the body politic, is the practical means of establishing justice. If it is accomplished in such a manner as to maintain a harmony between them all, compatible with the spirit of the commonwealth itself, whether it be a militaristic or a capitalistic or a proletarian commonwealth, or whatever its nature, the justice that will prevail is that described by the idealistic theory of justice. Otherwise, some kind of realistic justice will prevail; which political idealists, as well as those whose interests are unduly neglected or injured thereby, will call, not justice, but injustice. The final problem in forming a commonwealth, therefore, is to contrive that its government shall respond as far as possible to public, and not to private, purposes, to the end that the dominant opinion may be true public opinion, and not merely the personal opinions of the comparatively few who rule and of their friends and followers.

NOTES ON BOOKS

1. An excellent statement of the principle of religious liberty, as it has come to be understood in the United States, is contained in Chapter xiii of Cooley's *Treatise on the Constitutional Limitations,* noted in the preceding chapters.

2. The best single book on the modern theory of the educational function of the state is J. Dewey's *Democracy and Education* (1917).

3. The economic functions of the state are fully discussed in the standard treatises on political economy, such as those of J. S. Mill *(Principles of Political Economy,* 1st ed., 1848), and F. W. Taussig (*Principles of Economics,* 1st ed., 1910). The former reflects the kind of opinion which had the greatest influence in English-speaking countries during the later nineteenth century; the latter expresses more accurately the prevailing tendencies in the United States. Suggestive interpretations of different schools of contemporary policy may be found in Lord Hugh Cecil's *Conservatism,* L. T. Hobhouse's *Liberalism,* and J. R. MacDonald's *The Socialist Movement* (all in the Home University Library). For recent statements of the collectivistic attitude toward the existing relations between government and industry, see R. H. Tawney's *The Sickness of an Acquisitive Society* (1920) and S. and B. Webb's *The Decay of Capitalist Civilization* (1923).

4. There is still no better book than A. V. Dicey's *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century* (2d ed., 1914), and there is no adequate account of the development of economic policy in the United States. Monographs on special subjects, such as E. Stanwood's *American Tariff Controversies in the Nineteenth Century* (2 vols., 1903), and A. D. Noyes's *Forty Years of American Finance* (1909), are instructive.

5. The nature of public purposes, as understood by American lawyers, is explained in Chapters xiv and xv, dealing with the powers of taxation and of eminent domain, in Cooley's *Treatise on the Constitutional Limitations,* noted in the preceding chapters. For an excellent illustration of the development of public purposes in response to changing opinion concerning the promotion of the general welfare, see L. Rogers's *The Postal Power of Congress* (1916).

CHAPTER XI

THE REIGN OF LAW

1

THE foundations of the modern commonwealth consist in comparatively large measure of certain rational interests which all its people may have in common. The best statement of these interests is that contained in the Preamble to the Constitution of the United States. Of these interests the two that are most difficult to define are justice and liberty. Most political philosophers have sought to simplify the problem of definition either by defining justice in terms of liberty or by defining liberty in terms of justice. The latter seems the better way.

The necessity of a reign of law in a commonwealth

Liberty, meaning thereby political liberty in the scientific sense of the term, has accordingly been defined as the absence of human restraints upon human conduct other than those imposed by authority of just laws. Liberty, therefore, cannot be understood except as a by-product of the establishment of justice. Its enjoyment, however, is dependent upon the nature of the legal processes by which the powers of the state are exercised and the purposes of its people accomplished. The necessary connection between liberty and law becomes clearer, the more carefully one examines the nature of particular liberties. Personal liberty, for instance, and the free use of one's own property, are rights which are secure only against deprivation without due process of law. No person can claim as a part of his personal liberty any absolute immunity against the employment of the police power to accomplish

an appropriate public purpose. Constitutional states, like the United States of America, have sought to make interferences with certain liberties, notably that of the press in the strict sense of the term, extraordinarily difficult. But even the immunity of the citizen against an official censorship of the press might be denied or abridged, if such action were found to be necessary to insure domestic tranquillity or provide for the common defense, provided it were not accomplished without due process of law. In this case due process of law would mean an amendment to the Federal Constitution. In ordinary cases the process is simpler by which public purposes are lawfully accomplished. But in all cases the security for the blessings of liberty consists in the requirement of due process of law. Justice might conceivably be made to prevail by the fiat of a benevolent despot. Liberty is inconceivable except as a product of the reign of law.

The definition of law

By law, as the term is used in this connection, is meant merely those rules of conduct which are enforced with the sanction of the state. Doubtless there is a higher law lying hidden in the inscrutable purposes of the Creator of the Universe. The content of this law, however, must be sought in the conscience of men, except as they may believe it to have been revealed to them in their sacred writings. The rules of conduct so revealed may be enforced with the sanction of the state, in which case they become a part of the ordinary human or civil law. Or, if state and church are not united in a single commonwealth, they may be enforced only with the sanction of some church. In this case they form no part of the civil law. Other rules of conduct may be discovered by the study of the natural relations of cause and effect in the material universe and may be enforced only with the sanction of individual reason or scientific authority. In this case also they form no part of the civil law. Natural rights and moral rights

are real enough, in so far as men recognize and act upon them. But unless the state also recognizes them and thereby transforms them into civil rights, they form no part of the liberty, that is, the political liberty, of the people of the state. The laws of nature and the moral law serve to limit the authority of political sovereigns, but they do not enter into that process by which the rights of men are secured in modern states through the reign of law. In the United States, for example, the Declaration of Independence proclaims certain "inalienable," that is, natural rights. The consciousness of these natural rights profoundly influences the conduct of public affairs on behalf of the American people. But the rights derived from the law of nature do not enter into the administration of legal justice unless written into the law of the land by the law-making organs of government. If not formally incorporated into the law of the land, they merely serve as good advice for good Americans, to be followed or not at their discretion. The reign of law, which secures the blessings of liberty, is the reign of civil law.

What is a reign of law?

The reign of law may take different forms in different states. In ancient times the authority of the Roman law at the height of the Empire afforded the best illustration of a reign of law, and the influence of that example, as well as the content of the Roman law itself, has greatly affected the development of political ideas in modern times, especially in the continental states of Western Europe. But the first modern state to put effectual checks on the arbitrary power of rulers, and thereby to establish the supremacy of the law in the administration of justice, was England.

2

In England, according to the eminent English jurist, Sir Albert V. Dicey, "when we say that the supremacy or

rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions."[1] And he proceeds to explain the nature of these different meanings of a single expression. "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else."[2] It may be urged in criticism of this explanation that the power to punish for a breach of law confers upon some authority, judicial or other, the duty of ascertaining the fact of guilt and of exercising some discretion concerning the infliction of the prescribed penalties. After all is said, laws are administered by men, and may there not be ample room for arbitrariness in the process of administration? Dicey anticipates such criticism by explaining further that no man is punishable even for a distinct breach of the law unless that fact is established "in the ordinary legal manner before the ordinary Courts of the land."[3] Thus the reign of law means, in the first place, not only the supremacy of the rules of conduct, which have been incorporated into the law of the land, but also the observance by public officers charged with the enforcement of the law of those processes which have been duly established for that purpose.

Three meanings of the reign of law:

First, the supremacy of the ordinary law of the land

The greater part of Dicey's highly instructive *Introduction to the Study of the Law of the Constitution* is devoted to a detailed explanation of the nature of the processes of

The example of Great Britain

[1] *Introduction to the Study of the Law of the Constitution,* 8th edition, p. 183.

[2] *Ibid.,* p. 198.

[3] *Ibid.,* pp. 183-184.

law and the manner in which they operated in England before the World War. He makes it clear how Englishmen came to possess that sense of security against arbitrary rule and oppression which Montesquieu had noted a century and a half earlier and proclaimed abroad as the essence of English liberty.

Arbitrary government in France under the ancien régime

Modern Englishmen, Dicey admits, may feel some surprise that the reign of law, in the sense in which he is using the term, should be considered as in any sense a peculiarity of English institutions, "since at the present day it may seem to be not so much the property of any one nation as a trait common to every civilized and orderly state." This surprise, however, will disappear, if they will look back to the time when the English constitution first began to be criticized and admired by foreign thinkers like Montesquieu. During the eighteenth century, as Dicey points out, many of the continental governments were far from oppressive, but there was no continental country where men were secure from arbitrary power. "The singularity of England was not so much the goodness or the leniency as the legality of the English system of government." Dicey cites in illustration of this judgment the protracted struggle of the eminent authors of the *Encyclopédie* to obtain utterance for their thoughts, and the remarkable experiences of the great French philosopher, Voltaire. In 1717 Voltaire was sent to the Bastille for a poem which he had not written, of which he did not know the author, and with the sentiment of which he did not agree. In 1725, when he was the literary hero of his country, he was lured from the table of a duke, whose guest he was, and thrashed by lackeys in the presence of their noble master. He was unable to obtain redress of any kind, and because he complained of this outrage, he paid a second visit to the Bastille. Later in the century the Encyclopedists were compelled to wait

twenty-two years for permission to publish their celebrated work. Dicey shrewdly remarks that "it is hard to say whether the difficulties or the success of the contest bear the strongest witness to the wayward arbitrariness of the French Government."

Significance of the fall of the Bastille

Dicey's discussion of the general character of government on the Continent of Europe at this period is particularly illuminating. "Nor let it be imagined," he wrote, "that during the latter part of the eighteenth century the government of France was more arbitrary than that of other countries. . . . In France law and public opinion counted for a great deal more than in Spain, in the petty states of Italy, or in the Principalities of Germany. All the evils of despotism which attracted the notice of the world in a great kingdom such as France existed under worse forms in countries where, just because the evil was so much greater, it attracted the less attention. The power of the French monarch was criticized more severely than the lawlessness of a score of petty tyrants, not because the French King ruled more despotically than other crowned heads, but because the French people appeared from the eminence of the nation to have a special claim to freedom, and because the ancient kingdom of France was the typical representative of despotism. This explains the thrill of enthusiasm with which all Europe greeted the fall of the Bastille. When the fortress was taken, there were not ten prisoners within its walls; at that very moment hundreds of debtors languished in English goals. Yet all England hailed the triumph of the French populace with a fervor which to Englishmen of the twentieth century is at first sight hardly comprehensible. Reflection makes clear enough the cause of a feeling which spread through the length and breadth of the civilized world. The Bastille was the outward and visible sign of lawless power. Its fall was felt, and felt truly, to herald in for the rest

of Europe that rule of law which already existed in England."[1]

The reign of law and the adoption of written constitutions

The reign of law, according to Dicey's first meaning of the term, now exists not only in England and in all the dominions and dependencies of the Empire where the supremacy of the law of the realm is recognized, but also in many other modern states. An indication of at least a purpose to maintain a reign of law is afforded by the adoption of a written constitution. Definite methods may thus be provided for the enactment of rules of conduct into law and settled processes established for the actual administration of justice. An early expression of such a purpose, which is often cited, is the famous Mayflower Compact, adopted by the Pilgrim Fathers in the cabin of their ship, while it was lying off Cape Cod. But the Pilgrim Colony at Plymouth was not an independent state: it was merely a kind of local government. The first modern experiment in government under a written constitution on any considerable scale was that of the Puritan Commonwealth in the time of Oliver Cromwell. By means of the Instrument of Government, which Cromwell had had prepared, he sought in 1653 to convert his arbitrary rule into a reign of law. That experiment failed, and Englishmen did not again try to incorporate the fundamental laws of their realm into a single written document. Modern constitutional government was clearly foreshadowed by the Bill of Rights, which the English Parliament adopted in 1689, and the Act of Settlement, adopted in 1701, but actually began in the most approved form with the adoption of constitutions in the United States during the American Revolution. In 1789 the French Revolutionists introduced the written constitution to the Continent of Europe, and since then several hundred written constitutions have been adopted in all parts of the

[1] Dicey, *Introduction to the Study of the Law of the Constitution,* 8th edition, pp. 187-188.

world. At the present time the written constitution is the accepted basis of government in most of the civilized states. Nearly all the fifty-two states which are members of the League of Nations have written constitutions, and the principal states which are not members possess them also.

Failure of constitutional government under unfavorable conditions

But the adoption of a written constitution alone is not enough to maintain a reign of law. This is demonstrated by the experience of the Central- and South-American people who, after their successful revolt against foreign rule, were inspired by the example of the North American and French Revolutionists to organize their new states on the basis of written constitutions. Liberals everywhere a century ago had a touching faith in the efficacy of constitutional government, preferably upon republican principles, to bring order and progress to the discontented masses of men. And so the revolt against Spanish rule in America, and in part also against that of the Portuguese and French, led eventually to the foundation of a score of independent republics, all of which were intended to have governments of law, not the arbitrary rule of lawless men. But the failure of written constitutions to maintain the reign of law in some of these states was manifest almost from the beginning. "Within a few years after the declaration of independence," says a recent writer of high authority, discussing particularly the republics of Central America, "force had come to be recognized as the only means by which power was secured and held, and revolution was not only the sole remedy for bad government, but the one way in which a change of officials could be effected. Civil war was thus an indispensable part of the political system."[1] The masses of the people seemed to be indifferent to the advantages of a reign of law. Since they were not dis-

[1] Dana C. Munro, *The Five Republics of Central America,* Publications of the Carnegie Endowment for International Peace, 1918, p. 187.

posed to do what might be necessary to support it, arbitrary and oppressive rule was always possible. Despite the written constitutions, there was a government of men and not of law. Not only was there no reign of law in the narrower sense of the term, but the constitutions themselves possessed a merely "theoretic" authority. Such states, as Bryce observed, were not "real republics." [1] Nor was it only in Central America that Bryce found nominally constitutional states whose rulers conducted public affairs in the private interest of themselves and their friends, without regard for the interests of the people, or at least without sufficient regard for public interests to bring such states within the class of "real republics." The majority of the Latin-American states fell in these two categories.

Character of people the best guarantee of the reign of law

The maintenance of a reign of law evidently depends more on the character of a people than on the existence of a written constitution. The fact that a constitution has been formally put into writing may reveal a purpose to establish justice and secure the blessings of liberty under law, but unless the purpose is sufficiently widespread and deep-rooted to make the constitution something more than a thing of merely theoretic authority, the law will not be supreme. "Let this moment," said the first Manifesto of the Portuguese Republic, issued October 5, 1910, "be the beginning of an epoch of austere morality and immaculate justice." [2] The spirit of a commonwealth was there, but, as subsequent events have shown, the flesh was too weak to bring about so great an improvement over such an inferior type of state as the Portuguese monarchy had been. The firmest foundation for a reign of law is indicated by the experience of the English themselves. No Englishman thinks any less of the Bill of Rights or of the

[1] See *ante*, p. 64.
[2] H. A. L. Fisher, *The Republican Tradition in Europe*, p. 1.

Act of Settlement or, to cite a more recent example, of the Representation of the People Act of 1918, because they are not incorporated in a single document under a distinctive title. The constitutional character of these statutes is recognized by all. But not all the fundamental rules for the conduct of public affairs have been embodied by act of Parliament even in the Statutes of the Realm. The authority of that part of the British Constitution, which is not written into the law of the land, but is expressed only in the form of an unwritten code, is supported by long-established customs which have acquired the force of constitutional habits. It is the strength of the purpose on the part of the people of a state to establish justice and secure the blessings of liberty under law, rather than the form in which that purpose is expressed, which affords the best guarantee that the reign of law will be maintained.

Growing respect for the reign of law in this first sense

The American principle, that ours should be a government of law and not of men, contains this first meaning of the reign of law, as understood by Englishmen. Strictly speaking, the laws do not govern; men govern. But they govern by making and administering laws in accordance with the legal processes which have been duly established. The "Founding Fathers" inherited the principle from the mother country. Though anxious statesmen, like Abraham Lincoln in the midst of the Civil War, may sometimes have violated it, they did so in the belief that such action was necessary for the safety of the Union and hence ultimately for the preservation of the reign of law itself. The Supreme Court by its unanimous decision in the Milligan case sustained the principle against encroachments by over-anxious and over-zealous friends of the Union, and the people sustained it against the attacks of those who would have withdrawn from the Union rather than recognize the supremacy of its law. Defective as the observance of

due process of law often is, even in the best administered states, there is little disposition on the part of peoples who have once learned to appreciate its benefits to deny the principle itself. Their chief concern is that the law be just. They will resist governments, if necessary, whose proceedings are deemed unjust, but with as little violence to the authority of the law itself as possible. In war-worn Italy black-shirted Fascisti might conquer power by a show of force, but their first use of official authority was to secure from the Parliament an act of indemnity of some sort to cloak their usurpation with a garb of legality. Bolshevism might avowedly proceed by lawless force and violence among the long-oppressed peoples of Russia, but among those who have once enjoyed the blessings of a reign of law there is manifest reluctance to seek justice and liberty by any other means.

Importance of the method of constitutional amendment

The most important difference between the reign of law in England and in other states where it is maintained, so far as this first meaning of the term is concerned, results, not from the presence or absence of a written constitution, but from the ease or difficulty with which the constitution, whether written or unwritten, can be altered. In states with written constitutions, which are not so easy to change as ordinary laws, the people have an additional guarantee that the reign of law will be maintained. If the constitution is of more than theoretic authority, the limitations which it imposes upon the lawmaking power of the ordinary lawmakers cannot be altered by them, at least not by as easy a process as that for the making of an ordinary law. The people's sense of security, as far as it springs from a confidence that the reign of law will be maintained, is not wholly dependent upon the wisdom or self-restraint of the ordinary lawmakers. It is sustained also by the knowledge that at least greater deliberation is necessary, and in many cases also the concurrence of

other bodies of men, not so easy to move as the ordinary lawmakers, before the ordinary processes of law can be altered, and wide discretionary or arbitrary power be granted to officers of the government. In the United States, for example, the constitutional immunity against a censorship of the press and the constitutional right to trial by jury in prosecutions for libel cannot be denied or abridged by any ordinary lawmaking body. These rights can be altered only by the bodies which have the power to amend the Federal and State Constitutions. Constitutional law is more secure than statutory law. To the extent that the arrangements for making the law and the processes for administering it are embodied in a constitution which is comparatively difficult to change, there is greater security for the maintenance of the reign of law than there can be in any country where the processes of lawmaking and enforcement may be altered as easily as any other part of the law.

Comparative insecurity of reign of law in Great Britain

An unwritten constitution, like that of Great Britain, can be amended or revised by the same body of men who make the ordinary law of the land and by a similar process. If the constitution can be as easily changed as any part of the law of the land, the maintenance of the established arrangements and settled processes for the making and enforcement of law becomes merely a matter of policy, dependent, like ordinary legislative policies, upon the discretion of the ordinary lawmakers. Under such circumstances the process of law itself imposes no restraint upon the power of the lawmakers to deny or abridge the vested rights of the people. It is the sound judgment of the particular lawmakers who happen at any moment to be in power that alone furnishes the security for liberty. Such security is precarious in stormy times, when rulers are hard pressed to bring the ship of state safely into port. The comparative insecurity of the reign of law in England became apparent during the World War, when the Cabi-

net Ministers and other parliamentary leaders, who controlled the lawmaking power, discovered what a wide discretionary authority was really vested in their hands. The Defense of the Realm Acts in their final form were less drastic than in the form in which they were originally enacted, but for a time they conferred upon the officers of the government an amount of discretionary, not to say arbitrary, power without precedent in the history of English law since the period of the Stuarts. For the first time in more than two centuries an Englishman not in the military or naval service could be sentenced to death without a trial by jury. What was done under these acts was done by authority of law, but such proceedings were a breach of the reign of law, as understood by Englishmen before the World War and expounded by Dicey. Nor is there any protection against such proceedings, either in England or in any state where the whole process of lawmaking and law enforcement can be changed by the same authority as can change an ordinary law, except that afforded by the wisdom and self-restraint of the dominant opinion in the lawmaking body of the state. If the lawmakers of such a state temporarily lose their heads, that sense of security, so essential to the Englishman's liberty, will be lost by all who do not share in the panic of the moment. In other words, it will be altogether lost.

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The second meaning of the reign of law, as understood in England and expounded by Dicey, is "not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[1] In England the idea of the universal subjection of all classes to one

[1] Dicey, *Introduction to the Study of the Law of the Constitution,* 8th edition, p. 189.

law, administered by one set of courts of justice, has been pushed very far. Every official, from the Prime Minister down to a village constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The law reports, as Dicey points out, "abound with cases in which officials have been brought before the Courts, and made in their personal capacity liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all their subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person. Officials, such, for example, as soldiers or clergymen of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not effect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact is in no way inconsistent with the principle that all men are subject to the law of the realm in England; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen."

Second meaning of the reign of law: the subordination of public officers to the same law as private persons

This second meaning of the reign of law, like the first, has been understood in the United States as well as in England. An early case in which the principle was applied was that of the *Flying Fish,* decided by the Supreme Court in 1804.[1] This was an action for damages brought by the owners of a Danish merchant vessel against an American naval officer, who, they alleged, had unlawfully seized

The case of the Flying Fish

[1] Little vs. Barrème, 2 Cranch, 170.

their vessel. The case grew out of the enforcement of the Non-Intercourse Act of 1799, forbidding American vessels to sail to France for the purpose of trade, but not forbidding voyages from France to America. This act had been passed by a Congress which wished to put pressure on the French Government but was loath to continue the naval hostilities of 1798. The *Flying Fish* was bound from a French port to St. Thomas in the Danish West Indies, and was seized by the captain of an American warship, acting under instructions from the Secretary of the Navy to seize all American ships bound to or from French ports; he believed, though erroneously, that she was an American vessel. This action raised the issue, whether a naval officer, who executed the orders of his official superior in good faith, was liable to an action for damages in an ordinary court of law like any private citizen accused of seizing property without legal justification. The instructions under which the captain made the seizure manifestly went beyond the authority conferred by the Non-Intercourse Act, and the captain, believing the vessel to be an American, was placed in a dilemma. He could follow his instructions, though they were not fully supported by the authority of the law, or he could keep within the law by violating his instructions. He chose the former horn of the dilemma and, when suit was brought against him, pleaded the orders of the Secretary in defense of his conduct. He also insisted that the vessel, though Danish, was handled in such a manner as to give him reasonable ground to believe that she was an American. The Supreme Court declined to consider the latter point, holding that the seizure would have been unlawful, even though the vessel had been an American, and that the man who committed the act was personally liable for the damage, even though he was a naval officer acting under the instructions of his superior officer.

The opinion of the Supreme Court, which is not so well known as it deserves to be, was delivered by Chief Justice John Marshall. "I confess," Marshall said, "the first bias of my mind was very strong in favor of the opinion that, though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the country and those upon the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from a legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." Thus the reign of law, in the second meaning of the term, was formally recognized by the highest judicial authority in the land. If it be suggested that the collection of damages by the ordinary process of law from public officers, who have done wrong in obedience to orders, would put a great injustice upon faithful servants of the people, the answer is clear, that the Congress may relieve the officer of the burden of pay-

The opinion of Chief Justice Marshall

ing the penalty by an appropriate act of indemnity. Thus the supremacy of the ordinary law, as administered by the ordinary legal tribunals, may be reconciled with the maintenance of good discipline in the public service.

The case of the Arlington estate

Another great case in which the principle was upheld that a person is responsible before the ordinary judicial tribunals for his unlawful acts, even when performed in pursuance of his official duty, was that of the Arlington estate, decided by the Supreme Court in 1883.[1] This was an action of ejectment brought by the son of General Robert E. Lee against the Commandant of the Military Post at Fort Myer and the Superintendent of the National Cemetery at Arlington who, he alleged, were unlawful trespassers upon his property. During the Civil War, General Lee or, strictly speaking, his wife, had failed to pay certain taxes levied upon the beautiful estate at Arlington by authority of the Congress of the United States, and the tax collectors, acting in accordance with the Federal law, had seized the property and offered it for public sale. The government at Washington decided to acquire the property for a military post and national cemetery, and accordingly the War Department sent an officer to the sale to bid it in on the government's account. An offer from a friend of the Lee family to pay the taxes on behalf of the owner, which was submitted in due form as prescribed by the law, was rejected by the officer in charge of the sale, presumably acting in collusion with the representative of the War Department, and the property was sold to the latter, and devoted to military purposes. A portion of it became the last resting place of thousands of Union soldiers. General Lee himself never tried to recover the estate, but after his death his son denounced the government's title as defective and claimed the property for his own. An action to eject the Commandant of Fort Myer

[1] United States *vs.* Lee, 106 U. S. 196.

and the Superintendent of the Arlington Cemetery as trespassers was, in effect, an action to dispossess the Government of the United States of one of its most cherished possessions. It raised the fundamental issue whether a noble deed, the establishment of a splendid national monument to those who had given their lives for their country, performed by public officers acting, as they believed, in the discharge of their duty, should be set aside in the ordinary courts of justice, because those officers had failed to observe the process duly prescribed by law for the collection of delinquent taxes and had therefore acquired the property in an irregular manner.

The vindication of the reign of law

At the trial of the case the Government of the United States intervened formally on behalf of the officers against whom the suit was brought, alleging that the suit was in effect one against the government itself. The Attorney-General argued that in such a case the individual officers should not be held personally responsible for their presence on the property, since they were there in obedience to their orders, and that the United States alone should be held responsible. But, he asserted, the United States could not be sued without its own consent. If Mr. Lee had been treated with injustice, his remedy was to file a claim for damages or have a special bill introduced into the Congress, granting him suitable compensation. On the other hand, it was argued on behalf of Mr. Lee that his property could no more be taken from him unlawfully by officers of the United States than by ordinary individuals, and that he was entitled to his remedy at law in the one case as in the other. The Supreme Court was sorely perplexed by the conflict of rights and presumably could not have been blind to the sentimental interest which the people of the United States were bound to feel in maintaining possession of the property. Ultimately a majority of the court decided that, since the government's title was

imperfect, Mr. Lee had a right to demand his property back, and that an ordinary judicial tribunal had the power to order the ejectment of the officers of the United States. The doctrine was rejected that officers of the government are protected against the consequences of unlawful acts by the fact that they may claim to act in the name of the sovereign people. The opinion, which was written by Justice Miller, states the principle of the supremacy of law in language so clear and forceful that it must ever remain one of the most useful expositions of this fundamental principle of constitutional government.

The opinion of Justice Miller

The defense of the officers charged with trespass, Justice Miller declared, "stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only is no such power given, but it is absolutely prohibited, both to the executive and to the legislature, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation. . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are the creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . . Shall it be said in the face of all this . . . that the courts cannot give a remedy when

a citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

The Silverthorne Case

So scrupulous are the American courts to maintain the supremacy of the ordinary law in cases where the officers of the government itself are concerned that they will not permit the government to profit in any way by a wrong which its officers have committed. A significant illustration of this consequence of the reign of law is afforded by the action of the Supreme Court in the Silverthorne case, decided in 1920.[1] This was a case in which the officers of a business corporation, who had been sentenced by a Federal judge for contempt of court because they refused to obey an order to produce certain papers, appealed on the ground that the government had no right to demand the production of the papers in question. The Silverthornes had been suspected of an offense against the United States under the Espionage Act, but the prosecuting officers had met with great difficulty in finding evidence sufficient to support an indictment against them. Nevertheless, the Silverthornes were arrested and, while under arrest, their place of business was searched and incriminating papers were seized. Since no warrant had been issued authorizing the search and seizure, the prosecuting officers had photographic copies made of the incriminating papers, returned the originals to the office of the Lumber Company, and then obtained an order from the Federal district court directing the Silverthornes to produce the

[1] Silverthorne Lumber Co. *vs.* United States, 251 U. S. 385.

originals. It was their refusal to obey this order that brought down upon them the sentence for contempt. The Supreme Court held that, in general, information obtained by public officers in an improper manner cannot be used to support further proceedings in the manner prescribed by the Constitution and that, in this case, the proceedings of the prosecuting officers were so irregular as to invalidate the whole process against the Silverthornes. The judgment against them was accordingly dismissed.

Exceptions to the supremacy of the ordinary law over public officers: (1) Members of legislative bodies;

To the principle that public officers are subject, like private citizens, to the ordinary law administered in the ordinary courts there are, however, certain exceptions. In the first place, members of legislative bodies are entitled to certain immunities against judicial proceedings on account of their official position. The members of the Congress of the United States, for instance, are privileged from arrest during their attendance at the sessions of their respective Houses, and in going to and returning from the same, except in cases of treason, felony, and breach of the peace. Moreover, for any speech or debate in either House, they may not be questioned in any other place.

(2) Executive officers;

Secondly, executive officers may not be judicially brought to account by proceedings designed to interfere with the exercise of their discretion in the lawful discharge of their official duties, nor in cases which present a purely political question for decision. This was made clear by the Supreme Court in the proceedings which were instituted in 1867 to prevent the enforcement of the Reconstruction Act of March 3rd of that year, by which military government was established in the South. The Reconstruction Act had been vetoed by President Johnson on the ground that it was unconstitutional, and passed by the Congress over his veto. The State of Mississippi brought an action in the Supreme Court to restrain the President from

enforcing the Act on the same ground that he had offered in justification of his veto.[1] The Supreme Court refused to dictate to the President the line of action he should pursue under the Act, though he had made known his intention to enforce it, declaring that he was entitled to exercise his discretion. The State of Georgia then brought an action against Mr. Stanton, the Secretary of War, to restrain him from carrying out the President's orders under the Act on the ground that such orders would be unconstitutional and could not justify the Secretary in the performance of any acts otherwise unconstitutional.[2] But the Supreme Court held that the executive decision to enforce the Act disposed of a question which was purely political in character and presented no justiciable question of which the courts could take cognizance. It would be time enough for the courts to intervene when some public officer actually committed an unlawful act under the alleged authority of the orders of the Secretary or the President or of the Act of Congress itself. Meanwhile, it might be inferred, though the court did not say so, the proper tribunal for proceedings against the Secretary or the President, if either of them should dispose of a political question in an unlawful manner or unlawfully abuse his discretionary powers, would be that indicated in the Constitution, the Senate of the United States, sitting as a court for the trial of impeachments.

(3) Immunity of Federal officer against proceeding in State courts

Thirdly, judicial proceedings against public officers may not under all circumstances be brought in the ordinary courts, although the officers themselves are not exempt from ordinary judicial processes. The Supreme Court of the United States has decided, for example, that a State court could not discharge a soldier enlisted in the armed forces of the Federal Government from the custody of his

[1] Mississippi *vs.* Johnson, 4 Wall. 475 (1867).
[2] Georgia *vs.* Stanton, 6 Wall. 50 (1868).

superior officer by *habeas corpus* proceedings, although presumably the same result might have been accomplished through the Federal courts, if justice had so required.[1] The leading case in upholding the right of a Federal officer to have his official rights determined in the Federal courts is that of Neagle, a deputy United States marshal, who had been assigned to protect a justice of the United States Supreme Court on circuit in California against a threatened assault by an avowed personal enemy.[2] Neagle killed the man when the assault seemed imminent, and was arrested by officers of the State in which the killing occurred in order that he might be brought to trial before a court of the State. He was released by a writ of *habeas corpus,* issued by a Federal district court, and when the case came before the Supreme Court of the United States, the latter decided that the jurisdiction of the State court was properly denied and that the prisoner should be discharged. Justice Miller, speaking for the court, said that the deputy marshal was acting under the authority of the law of the United States, and "is not liable to answer in the courts of California on account of his part in the transaction." But proceedings against Federal officers take place in the same Federal courts as other proceedings under the laws of the United States. Special administrative tribunals, to be sure, have been established for special purposes, such as the Court of Claims, the Court of Customs Appeals, the Interstate Commerce Commission, the Federal Trade Commission, and other similar bodies, but on fundamental issues of law an appeal will always lie to the Supreme Court of the United States.

Droit administratif

In France and other countries on the continent of Europe the practice of excluding cases affecting the official conduct of public officers from the jurisdiction of the

[1] United States *vs.* Tarble, 13 Wall. 397 (1871).
[2] *In re* Neagle, 135 U. S. 1 (1890).

ordinary courts has been carried much further than in the United States. Here it is only Federal officers who may not be tried in the State courts for acts committed by authority of the law of the United States. In France all administrative officers have a right to trial in special courts, when the legality of their official acts is questioned by private citizens. At the head of these special administrative courts stands the Council of State, a tribunal of orderly processes and high prestige. Dicey has emphasized the differences between the French procedure in the trial of cases affecting the right of public officers before the Council of State and that pursued in England, where there is the same set of courts for all civil officers as for private citizens.[1] The procedure is undoubtedly very different. Dicey rightly concludes that the second meaning of the reign of law, as understood in England, does not apply in France. But the first meaning, which is its essential meaning, applies there as strictly as in England, despite the differences in the organization of the courts and in the processes by which the law actually reigns. As Dicey correctly says, not all persons in France are subject to one and the same law. He gives a mistaken impression, however, when he asserts that "it is even now far from universally true that . . . the Courts are supreme throughout the state."[2] The administrative law of France is a separate body of law from that administered in the ordinary civil courts, but the administrative courts are as truly courts as any tribunals can be in which determinable rules of conduct are administered in accordance with fixed and known processes.

The state of siege

In European states a further breach in the principle of the reign of law, as understood in England and expounded by Dicey, results from the power which the government

[1] Dicey, *The Law of the Constitution*, chapter XII.
[2] *Ibid.*, p. 190.

possesses in time of war or violent domestic disturbance to declare a state of siege. In France, for example, a state of siege may be declared by a special act of Parliament or, if Parliament is not in session, by a presidential decree. In the latter case, in order to guard against a *coup d'état,* an ever-present danger in the eyes of Frenchmen in time of trouble, Parliament is to meet within two days. Throughout the district declared to be in a state of siege, the military officials may search private houses at will, seize arms, and forbid all meetings and publications which they deem likely to disturb the public order. The military tribunals may exercise criminal jurisdiction in any cases they please, and punish any offenses they choose to recognize against the safety of the Republic or the general peace. The maxim, *salus populi suprema lex,* is reduced to a working rule of government, but that maxim has no place in the reign of law described by Dicey.

Martial law in the United States

A similar, though somewhat less arbitrary, power has been exercised in the United States. The Reconstruction Act of 1867 put the entire South in what was substantially a state of siege, though the criminal jurisdiction of the military authorities was more precisely defined than under the French law relating to the state of siege. In McCardle's case the legality of the military rule thereby established was challenged in the ordinary Federal courts.[1] The Act was sustained by the lower court. The Congress repealed the statute under which an appeal might have been taken to the Supreme Court, and the latter was unable to pass a final judgment in the case. From the opinions rendered by that court in the Milligan case, however, it may be inferred that a majority of the judges would have held the Reconstruction Act unconstitutional. As has already been pointed out,[2] the suspension of the

[1] *Ex parte* McCardle, 6 Wall. 318 (1868).
[2] See *supra,* pp. 366-372.

privilege of the writ of *habeas corpus* does not in itself deprive any person, accused of crime, who is not a member of the armed forces, of his right to a trial in an ordinary court by the ordinary process. It operates merely to postpone his day in court. But the Congress may not only authorize the suspension of the privilege of the writ, it may also provide special forms and processes of trial, where special circumstances justify such a course.

In the famous Milligan case the Court incidentally considered the question, under what circumstances the Congress would be justified in providing special arrangements for the administration of justice. The majority of the Court were of the opinion that it might do so only when the ordinary courts were actually prevented by hostile force from administering justice in the ordinary manner. A minority of the court, including Chief Justice Chase and Justice Miller, were of the opinion that the Congress itself must judge of the necessity of the case and might authorize special courts under extraordinary circumstances, even though the ordinary courts were not altogether prevented from performing their regular duties. This question has never been authoritatively settled. Presumably the Supreme Court would not sanction the administration of justice to civilians by military tribunals, if it believed the ordinary judicial tribunals capable of functioning satisfactorily, but doubtless it would not insist upon the particular test of capacity suggested by the majority in the Milligan case.[1]

The British Defense of the Realm Acts

The maxim, *inter arma silent leges,* ought to have no application in England, whatever be the case on the continent of Europe, but the Defense of the Realm Acts of 1914 certainly strained the principle of the reign of law nearly to the breaking point. The powers granted by

[1] See C. E. Hughes, "War Powers Under the Constitution," *Report of the American Bar Association,* 1917.

Parliament to the Crown and the military authorities to issue such orders as the public safety might seem to require, and to punish by military processes all violations of the orders so issued, brought about a situation not substantially different from that which exists on the Continent when a state of siege is proclaimed. The significance of that legislation, however, consists less in the precedent it established for the exercise of a very wide discretionary authority over civilians by military officers in time of war than in the evidence it affords of the instability of the English processes of law, when no legal distinction is made between the ordinary acts of Parliament and the fundamental law of the land. In this respect the reign of law in the United States and other states, where written constitutions put the organization of the courts and the processes for the administration of justice beyond the reach of casual majorities in the ordinary lawmaking bodies, is much more secure than in states like England where the majority of Parliament can legally repeal the *Habeas Corpus Act* as readily as it can extend the open season for catching trout or snaring partridges. It is not so much the administration of justice by authority of acts of Parliament that matters, as the security that established and approved processes will not be altered or set aside in times of trouble without due deliberation. Acts of Parliament are quickly procured in England by masterful ministers, but the public sense of security, like a tender plant, when once chilled, cannot be easily revived.

4

There remains yet a third and a different sense in which the reign of law, according to Dicey, may be described as a special characteristic of English institutions. "We may say," he writes, "that the constitution is pervaded by the rule of law on the ground that the general principles of

Third meaning of the reign of law: the creation of general rights by the decision of particular cases

the constitution (as, for example, the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution. . . . Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law."[1] And again, he says: "With us the law of the constitution . . . the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; . . . thus the constitution is the result of the ordinary law of the land."[2] There are, therefore, in England no formal declarations of rights like the French Declaration of the Rights of Man and of Citizens, adopted in 1789, and the similar collections of "glittering generalities," as they have been termed by unsympathetic critics, so dear to nineteenth-century Liberals in many countries. Such principles as can be discovered in the English constitution, Dicey observes, "are, like all maxims established by judicial legislation, mere generalizations drawn either from the decisions or the dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament." Such judgments, for example, are expressed by the Bill of Rights of 1689 and the Act of Settlement of 1701. They limit in certain respects the discretionary authority of the Crown but do not, for the most part, seek to confer general rights upon the people.

[1] Dicey, *The Law of the Constitution,* pp. 191-192.
[2] Dicey, *op. cit.,* p. 199.

The importance of legal processes

The principal effect of this distinction between the reign of law in England and the ordinary form of constitutional government in other countries, according to Dicey, is "that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced." He points out how the French Constitution of 1791 proclaimed liberty of conscience, liberty of the press, the right of public meeting, and the responsibility of public officers under the law. "But there never was a period in the recorded annals of mankind," he adds, with a not inexplicable touch of exaggeration, "when each and all these rights were so insecure, one might almost say, so completely non-existent, as at the height of the French Revolution."[1] And he continues: "On the other hand, there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced, which is the strength of judicial legislation. The juristic law, *ubi jus ibi remedium,* becomes from that point of view something much more important than a mere tautologous proposition. In its bearing upon constitutional law, it means that the Englishmen whose labors gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen. The *Habeas Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."

It is this third characteristic of the reign of law that is

[1] Dicey *The Law of the Constitution,* p. 194.

Due process of law in the United States

above all the attribute of constitutional government in the United States. The "Founding Fathers" themselves clearly understood its significance and its importance. Alexander Hamilton, replying in Number 84 of *The Federalist* to the charge that the Constitution of 1787 was defective, because it contained no Declaration of Rights, remarked that "bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was *Magna Charta,* obtained by the barons, sword in hand, from King John. . . . Such was the Petition of Right, assented to by Charles I in the beginning of his reign. Such also was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterward thrown into the form of an act of Parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing. . . . 'We, the People of the United States, . . . to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government." The Federal Constitution, Hamilton reminded his readers, declared and defined the rights of citizens with respect to the organization and administration of their government. It prescribed the processes by which men's rights should be determined in other cases. It specified the manner in which alone these rights and processes might be changed.

These were the primary securities for the reign of law and for the rights of men.

Ultimate security for the reign of law

Ultimately the security for the maintenance of a reign of law must depend on public opinion, and on the general spirit of the people and of the government. But where public opinion demands that the law be supreme in a state, a written people's constitution, which makes the fundamental law less easy to alter than the ordinary rules of conduct enforced by the state, furnishes a more solid basis for the reign of law than that which exists in a country like England, where the ordinary lawmaking body possesses the authority of a legal sovereign. In England the officers charged with the enforcement of law, including the judges themselves, are legally subordinate to the official lawmakers, the King and the members of Parliament. The majority of the House of Commons are, in effect, the court of last appeal. But in the United States no ordinary body of lawmakers holds the ultimate power. The American Constitution makes every public servant equally responsible for maintaining the supremacy of the law of the land. It gives judges in particular a stronger and more independent position than they can hope to enjoy in a land, like England, where their decisions must always be promulgated in the name of a king—never in that of the people. This enables them to create general rights by the decision of particular cases with greater assurance and effect, as long as they are sustained by the opinion of the people.

The fundamental principle of the American Constitution

Time was, when the Constitution of the United States was but a few thousand words engrossed on parchment. Since then, a long line of judicial decisions, construing every word and phrase, has made American constitutional law a veritable part of that "lawless science" of the law, which Tennyson so picturesquely and yet precisely describes:

> That codeless myriad of precedent,
> That wilderness of single instances.

Yet American constitutional law is not, strictly speaking, a lawless science. There runs through it all one fundamental principle, the principle which in the last analysis distinguishes the true commonwealth from inferior kinds of states.

The Topeka Ironworks Case

There are many judicial decisions, as well as pronouncements by the framers of constitutions and other statesmen, which declare this fundamental principle of constitutional government in the United States. Perhaps there is none, however, which makes it so plain as the opinion of Justice Miller of the Supreme Court in the great case of the Citizens Savings and Loan Association of Cleveland, Ohio, against the City of Topeka, Kansas, decided in 1874.[1] This was a case involving the validity of the action of the Topeka city government in repudiating a debt which it had contracted for the purpose of encouraging and assisting a wrought-iron bridge-manufacturing and ironworks company to establish and operate a plant in that city. The city government had issued a hundred thousand dollars' worth of bonds, acting under the authority of certain laws passed by the Kansas State legislature, particularly an act which specifically granted to cities like Topeka the power to "encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city," either by direct appropriation from the general fund or by the issuance of bonds. In this instance the enterprise seems not to have prospered. At all events, the city presently withdrew its support and refused to make further appropriations for meeting the interest on the bonds. The bondholders sued for the money that was due them. It was conceded that the city had taken in due form all the steps required by the act for issuing the bonds,

[1] 20 Wall. 655.

and that the language of the act was broad enough to justify the action of the city officials, provided that the act itself was within the constitutional authority of the legislature. The city defended the repudiation of its obligation on the ground that the law was in fact unconstitutional. The Supreme Court took the same view of the case, holding that the legislature had no right to pass such an act, that the proceedings of the city government in connection with the bond issue were, therefore, unlawful, and that the bondholders consequently were not entitled to receive any interest on their bonds, or even to recover the principal of their loan from the city.

The opinion of Justice Miller

Justice Miller begins his justification of this decision by laying down the proposition that debts contracted by municipal corporations must be paid, if no other means are available, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in the future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. It is, therefore, to be inferred that when the legislature of the State authorizes a county or city to contract a debt by issuing bonds, it intends to authorize the county or city to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference. Hence, unless the Kansas legislature had the right to authorize the counties and towns of that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals or private corporations for purposes of gain, the law was void, and the bonds issued under it must also be void. Justice

Miller then proceeds to consider the limitations upon governmental power which grow out of the nature of all free governments. The nature of these limitations in general is well illustrated by the nature of the tax power in particular, because "of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. . . . The power to tax is the power to destroy. . . . A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after its passage. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised." Justice Miller next cites numerous authorities to show that taxes have always been regarded as means of raising money for public purposes, and not merely for private or personal use. "We have established," he concludes, "beyond cavil that there can be no lawful tax which is not laid for a public purpose." Since the Court was of the opinion that in this instance the money borrowed by the city for the bridge-manufacturing and ironworks company was used for a private, and not a public, purpose, it was necessary to decide that the legislature had no power to authorize the city to raise money by taxation to repay the loan. Not only must the powers of the State be exercised in accordance with due process of law, but the laws themselves may be enacted only for purposes which are deemed to be public.

The reign of law, as understood in the United States, has been strengthened and confirmed by a recent impor-

The Second Federal Child Labor Law Case

tant decision of the Supreme Court in the case of Bailey *vs.* Drexel Furniture Co.[1] This was a case involving the constitutionality of the second Federal child labor law, by which the regulation of the hours of labor of children in industry was treated as an incident of the power to tax. It will be recalled that the first Federal child labor law, enacted in 1916, was declared unconstitutional on the ground that, though purporting to be a regulation of interstate commerce, it was in reality a regulation of conditions of employment in the States, a matter reserved under the Federal Constitution for the States respectively. The second Federal child labor law was designed to accomplish the same purpose as the first by means of a special tax on the profits of manufacturers employing child labor without regard to the standards established by the Congress of the United States. Chief Justice Taft, speaking for the Court, pointed out that the effect of the tax would probably be, not to raise revenue, but to constrain the owners of factories where children were employed to conform to the standard of employment prescribed by the Federal child labor law. Since the products of these factories were in themselves no more injurious than others not made in factories where children were employed, presumably the ulterior purpose of the tax was to regulate the conditions of employment of children in industry within the States. The raising of revenue from the profits of manufacturers dealing in the products of child labor seemed a mere pretext to give the Federal Government jurisdiction over a subject which under the Constitution had been reserved exclusively to the States. The regulation of child labor within the States, the Supreme Court conceded, was a public purpose, but it was not one which the Federal Government was authorized to pursue, either directly by an appropriate police regulation or indirectly by the use of the tax power.

[1] 259 U. S. 20 (1922).

Such a purpose could properly be carried out only by means of the police power reserved under the Constitution to the several States. In other words, the power to tax is not the power to destroy, as was formerly supposed. It is the power only to raise money for lawful public purposes. Thus the efforts of the Congress of the United States to give effect to a humane popular sentiment by protecting more securely the health of the nation's children were frustrated. But rarely has the principle of the reign of law been so bravely vindicated.

The test of public purpose

This is the fundamental principle which governs the exercise of power in every land where the American idea of the reign of law prevails. Public officers, whatever be the nature of their offices, have no right to use their authority for any but legitimate public purposes. This principle applies not only to the tax power, but also to the police and war powers and all the other powers of a government. It explains how the State and Federal courts in the United States have been able to declare unconstitutional so many legislative enactments and local police regulations which seemed to them unduly to sacrifice the interests of some class within the community for the benefit of another class. Under this system of constitutional government the judiciary have the same duty as other public officers to act upon their opinions concerning the purposes which may be supposed to animate the laws. The practical test of the reign of law in a particular case is the concurrence of the opinion among the various kinds of public officers concerned that the measures involved in the case may serve a legitimate public purpose.

5

It is not enough to secure the blessings of political liberty, however, that there should be a reign of law. The laws must also stand the test of justice. But perfect justice is

Political liberty and civil liberty

an ideal, and how nearly just the law may be in particular cases will always remain a matter of opinion. Herein lies the difference between civil and political liberty. Political liberty, like justice, is an ideal, the pursuit of which is one of the purposes of the people of a commonwealth. Civil liberty, however, is a reality. It exists wherever a people generally believe that the forms and processes of their government are such as to make possible the reign of just law.

Comparison of the reign of law in Great Britain and in the United States

It may be suggested that the contrast between England and the United States is, after all is said, not of great practical importance. In England, as well as in the United States and other states which possess written constitutions adopted in the name of the people, civil liberty exists in a notable measure. Political power is supposed to be used only for public purposes, and the reign of law is intended to be a reign of just law. To be sure, there is nothing in the English Constitution, like the statement in the first article of the new German Constitution, that "political authority is derived from the People." But it is not necessary. Englishmen recognize that there is a distinction under their constitution between legal and political sovereignty. Legal sovereignty means simply the power of lawmaking unrestricted by any legal limit. In this sense of the term sovereignty is the attribute of Parliament. That body is politically sovereign, however, as Dicey has said, whose will is ultimately obeyed by the citizens of the state.[1] In the last analysis, it may be said that in England, as in other lands under the reign of law, the political sovereign is the whole body of people. The opinion that is supposed to dominate the processes of lawmaking and law enforcement is public opinion. What Englishmen as well as Americans presumably seek is a

[1] *Introduction to the Study of the Law of the Constitution,* 8th edition, p. 70.

reign of law, based upon the consent of the governed and sustained by the organized opinion of the sovereign people.

"Realistic" theory of the reign of law

But popular sovereignty is a philosophical concept. It is only by a fiction that the whole body of people govern. The opinion which immediately and directly prevails in the conduct of public affairs is the opinion of the rulers who actually hold sway. Let us lay aside for a moment the legal and political fictions, and consider who these rulers really are. In England they are Cabinet Ministers and other influential members of the dominant party in the House of Commons. They may be Conservatives or Liberals or Labor party men, but they are never merely Englishmen. They are dependent for power on the support of certain groups of Englishmen, but not on that of all Englishmen. The laws which they make and the policies which they pursue may be such as will serve the interests of all the people and be supportable, if not actually supported, by all. But their political opponents will not hesitate to charge them with putting partisan before public interests, as far as they are able to do so, and the interests of their own special group within the party before all others. If a right be defined as an interest that is secured by law, the interests of the actual rulers may well be confused with the rights of the people themselves. Political writers who pride themselves on their "realism" have claimed that this is in fact the true explanation of the nature of the law. "The rules of law," one such writer has declared, "are established by the self-interest of the dominant class, so far as it can impose its will upon those that are weaker."[1] Justice, they conclude, as a practical matter is substantially identical with the interests of the most powerful class or group in the state. If this realistic theory of the law and of justice is correct, the

[1] Brooks Adams, quoted by Roscoe Pound in his *Introduction to the Philosophy of Law.* See also Leon Duguit, "Law and the State," 31 *Harvard Law Review,* No. 1, chapters 8 and 9. (November, 1917.)

reign of law is but a camouflage for the domination of special interests. The important differences between the reign of law in England and in the United States will result from the differences, if any, in the character of the interests which have the preponderance of power in the two countries.

"Idealistic" theory of the reign of law

The political idealist is bound to admit that this explanation of the nature of law and of justice is not without some foundation in fact. But he will not admit that all governments must necessarily be dominated to the same degree by special interests. He insists that it is possible for the people of a commonwealth, whatever may be the case in the inferior types of states, to establish the kind of justice and to secure the blessings of the kind of liberty which they seek. He will cling to his conviction, therefore, that no law can be deemed truly just, which cannot be sustained by the opinion that it will serve the common interest of all the people. But he recognizes that the kind of justice which will actually be established will depend on the forms and processes for establishing it, as well as on the nature of the conflicting interests which the laws are designed to adjust. He knows that ideal justice depends on so organizing the government and arranging its processes that there may be a reign of law, based in fact and not merely by a fiction on the consent of the governed, and sustained in like manner by the organized opinion of the people in whose name it is established. The practical problem, therefore, which confronts the people of a commonwealth, is to organize a government which cannot be dominated by privileged groups seeking to promote their special interests at the expense of the rest of the community. It is a problem of maintaining processes of law which will respond to public and not private purposes. It is the problem of civil liberty. If the idealistic theory of law and of justice has any truth in it, the reign of law

may be the means of maintaining the predominance of general over special interests. The most important differences, therefore, between the reign of law in England and in the United States should result from the differences in the manner in which the problem of civil liberty has been solved.

The actual significance of a reign of law

Whether the idealistic or the realistic theory of law and of justice better describes the circumstances of a particular state is a question of fact which can be answered only by a careful study of the actual processes of government in that state. It is enough to point out that, if the idealistic theory furnishes the better description of the nature of the law and justice that prevail in a particular state, that state should be ranked among the commonwealths. If the realistic theory is more applicable, it is probably an inferior kind of state. A body of people, therefore, who wish their state to be a successful commonwealth must understand not only the purposes, which are declared in the Preamble to the Federal Constitution, but also the principles of government which are suitable for the accomplishment of such purposes.

The relatio between the theory of the common- wealth and the problem of governmen

In framing a government for any superior kind of state, the great difficulty, as Madison pointed out in the 51st number of *The Federalist,* is first, to enable the government to control the governed, and secondly, to oblige it to control itself. The solution of the first part of the difficulty depends upon the character of the foundations of the state itself. The people must understand the nature of justice and of liberty and must really intend to establish justice and to secure the blessings of liberty. Otherwise, the authority of the rulers must rest mainly on the inertia, deference, and fears of the governed, rather than on their rational interests and deliberate consent. But the practicability of a commonwealth for a particular body of people will be determined largely by the nature of the sentimental ties,

the sympathies and antipathies, which bind together or force apart the various religious communions, nationalistic groups, social classes, and economic interests among them. Religious prejudices, nationalistic and class hatreds, such as easily result from class and nationalistic consciousness and religious fervor, do not make for impartial justice and liberty. They impair the authority of rulers in any kind of state; they make a commonwealth impossible. Where differences of sentiment as well as of interest are great, the ability of the government to control the governed is contingent upon the toleration of differences among the people themselves. The solution of the second part of the difficulty is another matter. It depends upon the establishment of a reign of law.

The opinion of Aristotle

The significance of the reign of law has long been understood by the most intelligent political scientists. It was first stated by Aristotle, and no subsequent writer on the science of government has stated it more clearly than he. He was discussing the question, what should be the supreme power in the state? "Laws," he wrote, "when good, should be supreme. . . . But what are good laws has not yet been clearly explained. . . . The goodness or badness, the justice or injustice, of laws is of necessity relative to the constitutions of states. But if so, true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws."[1] What Aristotle meant by saying that the justice or injustice of laws is relative to the constitutions of states is plain enough. In a militarist state they must satisfy the test of justice which is appropriate to such a state. They must be designed to accomplish such an adjustment of the conflicting interests of members of the state as will best promote or least impair the strength of the state as a whole. In a capitalist state they must satisfy the test

[1] Aristotle, *Politics*, Book III, chapter 11, sections 19-21.

of prosperity. In a proletarian state, that of equality. In the ideal commonwealth they must satisfy the test of virtue. But what does he mean by his distinction between true and perverted forms of government? The answer appears in another passage which he had already written. "The conclusion is evident: that governments, which have a regard to the common interest, are constituted in accordance with strict principles of justice, and are therefore true forms; but those which regard only the interest of the rulers are all defective and perverted forms."[1]

The importance of the problem of government

How, then, shall the government of a modern commonwealth be constituted? That becomes the essential question. The provisional answer must be that which Kant and the later idealists have given. The government should be so constituted as to establish a harmony between the processes of law and the principles of right in which the people of the commonwealth believe. A final answer must await the results of a study of the actual processes of government in modern states. Such a study may be pursued in the faith that justice and liberty are the necessary fruits of a rightly constituted government in any commonwealth whose foundations are well laid. Two centuries ago an English poet, then highly esteemed in fashionable circles, published the oft-quoted lines:

> For forms of government let fools contest;
> What'er is best administered is best.

Apparently, Alexander Pope thought the chances of good administration were no better or worse under one form of government than under another. Perhaps he was right, as far as the inferior types of states are concerned, though even on this point the political scientists, from Aristotle on, would disagree with him. But his dictum will not be accepted by the people of a modern commonwealth. What are the grounds which should lead such a people to prefer

[1] Aristotle, *Politics*, Book III, chapter 6, section 11.

one particular form of government rather than another cannot be considered here. But they know that in general, as the Puritan statesman, John Pym put it, "that form of government is best which doth actuate and dispose every part and member of the State to the common good." Under such a form of government the people of a commonwealth might confidently expect that measure of justice and liberty which the nature of their commonwealth permitted.

The ideal commonwealth

Whether ideal justice can be completely established in the sovereign states of modern times, however, may well be doubted. To say nothing of other obstacles, the nature of modern states makes it very difficult to establish justice in that great class of cases where the interests of the people of more than one state are concerned. Those who seek the fullest and most complete justice must demand a commonwealth organized on a far broader basis than the contemporary capitalistic and nationalistic states. Their aspirations were most adequately voiced in one of the noble speeches delivered during the World War by Woodrow Wilson. Standing before the tomb of Washington at Mt. Vernon on July 4, 1918, he said: "What we seek is the reign of law, based upon the consent of the governed and sustained by the organized opinion of mankind."

NOTES ON BOOKS

1. The significance of the reign of law is discussed from a variety of viewpoints in Roscoe Pound's *Introduction to the Philosophy of Law* (1922), and *Interpretations of Legal History* (1923).

2. A. V. Dicey's *Introduction to the Study of the Law of the Constitution* (8th ed., 1915) serves as an introduction, not only to the British Constitution, but also almost equally well to that of the United States.

3. F. J. Goodnow's *The Principles of the Administrative Law of the United States* (1905) is the best general introduction to the law of public officers, but this phase of the subject has

developed so rapidly in recent years that this book needs to be supplemented by a study of the later decisions of the Courts. The special relations between military and civil authority are discussed in G. Glenn's *The Army and the Law* (1918).

4. The importance of legal processes is made clear by any of the standard treatises on the law of the Constitution, noted in earlier chapters. See especially L. P. McGehee's *Due Process of Law Under the Federal Constitution* (1906). For the recent cases, illustrating this phase of the subject, see the annual summaries of the decisions of the Supreme Court in cases of constitutional law, formerly prepared by T. R. Powell, latterly by E. S. Corwin, and published from time to time in *The American Political Science Review*.

5. The most noteworthy attempt by any recent American writer to work out scientifically the relation between civil liberty and self-government is J. W. Burgess's *Political Science and Comparative Constitutional Law* (2 vols., 1890). Burgess rendered a solid service to political science by emphasizing the importance of the forms and processes of government, but his treatment of the subject is not altogether satisfactory because of his defective analysis of the problem of self-government. This is clearly evident in his later work, *The Reconciliation of Government with Liberty* (1915).

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